No. 99-536-CFX Title: Roger Reeves, Petitioner
v.
Sanderson Plumbing Products, Inc.

Docketed: September 27, 1999 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Sep 15 1999	Petition for writ of certiorari filed. (Response due October 27, 1999)
	Oct 4 1999	Brief of respondent Sanderson Plumbing Products, Inc. in opposition filed.
	Oct 20 1999	DISTRIBUTED. November 5, 1999
	Nov 8 1999	Petition GRANTED. SET FOR ARGUMENT March 21, 2000. **********
	Dec 3 1999	Order extending time to file brief of petitioner on the merits until January 7, 2000.
	Dec 6 1999	Record filed.
	Dec 7 1999	Record filed.
	Jan 7 2000	Brief amicus curiae of Hispanic National Bar Association filed.
	Jan 7 2000	Joint appendix filed.
	Jan 7 2000	Brief of petitioner Roger Reeves filed.
	Jan 7 2000	Brief amici curiae of United States, et al. filed.
	Jan 7 2000	Brief amicus curiae of National Employment Lawyers Association filed.
	Jan 7 2000	Brief amicus curiae of AARP filed.
	Jan 7 2000	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jan 7 2000	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Jan 13 2000	CIRCULATED.
	Feb 4 2000	Brief of respondent Sanderson Plumbing Products, Inc. filed.
	Feb 4 2000	LODGING consisting of twenty bound copies of Lower Court material received from counsel for the respondent and distributed.
	Feb 7 2000	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Feb 7 2000	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	Feb 7 2000	Brief amicus curiae of Equal Employment Advisory council filed.
	Feb 7 2000	Brief amicus curiae of Society for Human Resource Management filed.
	Feb 7 2000	Brief amicus curiae of Texas Association of Business and Chamber of Commerce filed.
	Feb 7 2000	Brief amicus curiae of Alabama Retail Association filed.
	Feb 18 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 25 2000	Motion of petitioner to strike respondent's lodging appendix filed.
	Feb 25 2000	Petitioner's response to motion of the Solicitor

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No. 99-536-CFX

Entry	Date	Proceedings and Orders
		Generalfiled.
	Mar 1 2000	Response to petitioner's motion to strike respondent's lodging appendix filed.
	Mar 3 2000	Motion of the Solicitor General on behalf of the EEOC for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Mar 3 2000	Motion of petitioner to strike respondent's lodging appendix DISTRIBUTED.
	Mar 6 2000	Motion of petitioner to strike respondent's lodging appendix DENIED.
	Mar 6 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. to be divided as follows: 20 minutes for petitioner and 10 minutes for the Solicitor General.
	Mar 6 2000	Reply brief of petitioner Roger Reeves filed.
	Mar 16 2000	Letter from counsel for the petitioner received and distributed.
	Mar 21 2000	ARGUED.

(1)

FILED

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No. _____ OFFICE OF THE CLERK

In The
UNITED STATES SUPREME COURT

OCTOBER TERM, 1998

Roger Reeves, *Petitioner,*

vs.

Sanderson Plumbing Products, Inc., *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Jim Waide
MS Bar No.: 6857

Waide, Chandler & Fleitas, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, MS 38802
(662) 842-7324
Counsel for Petitioner

2818

QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

2. In determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 50, should a District Judge weigh all of the evidence or consider only the evidence favoring the non-movant?

3. Whether the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56 is the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Roger Reeves, Plaintiff/Appellee;

2. Sanderson Plumbing Products, Inc., Defendant/Appellant;

3. Jim Waide, Attorney for the Plaintiff/Appellee; and

4. Taylor B. Smith, Attorney for the Defendant/Appellant.

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No: _____

In The

UNITED STATES SUPREME COURT

October Term, 1998

Roger Reeves, *Petitioner,*

vs.

Sanderson Plumbing Products, Inc., *Respondent.*

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is attached as an appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of appeals for the Fifth Circuit entered on April 22, 1999, Petition for Rehearing En Banc denied June 18, 1999, by a Writ of Certiorari under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

The statute construed is the Age Discrimination in Employment Act, 29 U.S.C.S. § 623 (a) which says: "It shall be unlawful for an employer -- (1) ... to discharge any individual or otherwise discriminate against any individual ... because of such individual's age . . . "

STATEMENT

A jury in the United States District Court for the Northern District of Mississippi found that Petitioner, Roger Reeves, was fired because of his age. The United States Court of Appeals for the Fifth Circuit reversed, holding that Respondent was entitled to judgment as a matter of law under Fed. R. Civ. P. 50 because Petitioner failed to produce evidence sufficient to satisfy its "pretext plus" standard for submitting an age discrimination case to the jury.

(FACTS)

Petitioner, Roger Reeves, worked for Respondent, Sanderson Plumbing Products, Inc., for forty (40) years before he was fired at age fifty-seven (57). (R. at 1-4) Two (2) months before Reeves was fired, Powe Chestnut, Director of Manufacturing, and the "absolute power" at the company (R. at 80-86), told Reeves he was "too damn old to do the job." (R. at 26, 59) By the time of trial, Respondent had utilized three (3) different replacements for Reeves. All were in their thirties. (R. at 101-102, 224)

Respondent claimed Reeves was fired because an investigation revealed overpayment of hourly employees, and that Reeves failed to reprimand employees who were absent or tardy. (R. at 113, 115, 119)

In rebuttal, Reeves produced evidence that his subordinates were on time and that, in any event, his superior productivity records show that the company was not suffering any losses because of alleged absences or tardies of workers. (R. at 18-19, 73, 241-245, 246-249) Furthermore, failing to reprimand employees who were absent or tardy could not have been the reason for his discharge, since he was not the person responsible for giving reprimands. (R. at 20-21)

The United States Court of Appeals for the Fifth Circuit agreed Plaintiff produced sufficient evidence that the reasons given for Reeves' firing and replacement by younger persons were pretextual. (Op. at 9). However, the Fifth Circuit concluded that: "Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." (Op. at 9).

Applying this "pretext plus" test, the Fifth Circuit found the evidence insufficient because the age-based statements were made by only one of three (3) decision makers, and because Reeves did not otherwise prove "a violation of the Age Discrimination in Employment Act ("ADEA") by a preponderance of the evidence." (Op. at 1) In finding there was not substantial evidence of age discrimination, the Fifth Circuit relied upon the Respondent's (movant's) evidence, that two (2) of the decision makers were themselves over age fifty (50) and that Respondent had also accused other workers of inaccurate record keeping, including a thirty-five (35) year old. Appellee's brief, p. 5.

In requiring direct evidence of age discrimination, and in relying upon evidence produced by the movant in deciding a

Rule 50 motion, the United States Court of Appeals for the Fifth Circuit differs from other circuits.

I. THIS COURT SHOULD GRANT CERTIORARI SINCE THERE IS A SPLIT IN THE CIRCUITS WITH RESPECT TO WHETHER PROOF OF PREFERENTIAL TREATMENT FOR A MEMBER OF THE PREFERRED CLASS. FOR PRETEXTUAL REASONS, IS SUFFICIENT TO PRESENT AN EMPLOYMENT DISCRIMINATION CASE TO THE JURY.

Regarding the evidence necessary to create a factual issue under Title VII of the Civil Rights Act of 1964, this Court has stated: "... [R]ejection of defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (Emphasis added).

Some circuits hold the above language from *Hicks* means that proof of a *prima facie* case coupled with proof of pretext is always sufficient to present a jury question. Other circuits disagree, and require direct evidence of discriminatory intent.

The Fifth Circuit is one of the circuits using the "pretext plus" (direct evidence) test for determining the sufficiency of the evidence to present an employment discrimination case to the jury.[1] *Walton v. Bisco Indust., Inc.,* 119 F.3d 368, 370 (5th Cir. 1997) (stating a reason cannot be proved to be a

[1]While *Hicks* was decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, all circuits agree *Hicks* governs age discrimination cases.

pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason).

Several circuits agree with the Fifth Circuit that there must be additional evidence, other than evidence of a *prima facie* case, and pretext evidence, in order to create a jury question. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (stating the Supreme Court in *Hicks* did not mean *prima facie* case plus proof of pretext was always sufficient to present a jury question); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) (stating to avoid summary judgment, plaintiff had to prove not only that the reason the employer presented was false, but that discrimination was the real reason).

Other circuits have held that the elements of a *prima facie* case, plus evidence of pretext, are sufficient to create a jury issue. *See Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224-25 (2d Cir. 1994) (stating intentional age discrimination may be demonstrated by reliance on the evidence that established the *prima facie* case and proof of pretext without necessity for any additional evidence); *Sheridan v. E.I. Dupoint de Nemours & Co.,* 100 F.3d 1061, 1069 (3rd Cir. 1996) (stating evidence which supports a *prima facie* case, coupled with the jury's determination that employer's proffered explanations were pretextual is sufficient to support a verdict of discrimination); *Fuentes v. Perski*, 32 F.3d 759, 761 (3d Cir. 1994) (stating to survive a motion for summary judgment, the plaintiff must introduce evidence which will cast doubt upon the reasons offered by the defendant so that the jury may infer that discrimination was the motivating factor); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1122-23 (7th Cir. 1994) (stating fact-finder may find in the plaintiff's favor when a *prima facie* case of discrimination is established and plaintiff shows the falsity of the employer's proffered reasons); *Courtney v.*

Biosound, Inc., 42 F.3d 414. 418 (7th Cir. 1994) (stating plaintiff will defeat a motion for summary judgment by producing evidence from which a jury could infer that the company's proffered reasons were pretextual); *Washington v. Garrett,* 10 F.3d 1421, 1433 (9th Cir. 1994) (stating once plaintiff establishes *prima facie* case, and raises genuine question as to whether the employer's explanation is true, there will always be a question for the fact-finder); *Combs v. Plantation Patterns,* 106 F.3d 1519, 1529 (11th Cir. 1997) (stating plaintiff in a discrimination case can avoid judgment as a matter of law by proving the *prima facie* case and showing that the defendant's reasons are a pretext); and *Barbour v. Merrill,* 48 F.3d 1270, 1277 (D.C. Cir. 1995) (stating plaintiff only needs to establish a *prima facie* case and introduce evidence to discredit the defendant's proffered reasons in order to create a jury issue).

This split in the circuits has been discussed by legal commentators. *See* Catherine J. Lanctot, *Pretext-Plus After Hicks: The Circuit Split Remains, Wiley Employment Law Update* 161 (1996); C. Pledger, *Rhodes v. Guiberson Oil Tools: The Fifth Circuit's Approach to Pretext Evidence in Employment Discrimination*, 57 LA. L. REV. 1393; Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57 (1991).

Besides the split in the circuits, this Court should also review this case since the approach of the Fifth Circuit is inconsistent with the indirect evidence method of proof mandated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973), and followed in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981), and *Hicks*, 509 U.S. at 502 (1993). The theory underlying *McDonnell-Douglas* and its progeny is that an employer in an employment discrimination case will not

ordinarily admit employment discrimination. Because of the unavailability of direct evidence, this Court adopted the indirect burden-shifting method of proof. Requiring direct evidence (i.e., "pretext plus") cannot be reconciled with *McDonnell-Douglas* and its progeny, which hold direct evidence is not required.

II. CERTIORARI SHOULD BE GRANTED SINCE THE FIFTH CIRCUIT'S WEIGHING OF ALL THE EVIDENCE IS INCONSISTENT WITH THE APPROACH OF OTHER CIRCUITS WHICH CONSIDER ONLY THE EVIDENCE FAVORING THE NON-MOVANT, AND SINCE THIS APPROACH FAILS TO TAKE INTO ACCOUNT THIS COURT'S TEACHING THAT THE STANDARDS FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50 AND GRANTING SUMMARY JUDGMENT UNDER RULE 56 ARE THE SAME.

In reversing the jury verdict, the Fifth Circuit applied the standard it adopted in its leading case, *Boeing v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*):

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence - not just that evidence which supports the non-mover's case ... If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper ... there must be a conflict in substantial evidence to create a jury question ...

The Fifth Circuit's weighing of all the evidence, rather than determining only whether non-movant's evidence

supports the verdict, is contrary to the rule in other circuits. Dissenting from this Court's denial of certiorari, Justice White described the conflict in the circuits as follows:

> [I]t is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the non-moving party. This is also the position of at least the Fifth and Seventh Circuits. *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (CA 5 1969); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 281-282 (CA 7 1981). In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. *Simpson v. Skelly Oil Co.,* 371 F. 2d 563 (CA 8 1967). The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. *Layne v. Vinzant*, 657 F.2d 468, 472 (CA 1 1981); *Inventive Music Ltd. v. Cohen,* 617 F.2d 29, 33 (CA 3 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue.

Venture Technology, Inc. v. Nat'l Fuel Gas Distribution Corp., 459 U.S. 1007, 1009 (1982). *See also Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1993) (stating "Generally, only evidence favoring the non-moving party should be considered").

The Court of Appeals' decisions which have rejected the Fifth Circuit's consideration of all of the evidence and consider only the evidence which supports the non-movant are: *CPC International, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 46 F.3d 1211, 1214 (1st Cir. 1995); *Casko v. Elgin,*

Joliet and Eastern Ry. Co., 361 F.2d 748, 749 (7th Cir. 1966); *Lyons v. J.C. Penney Co.,* 316 F.2d 753-54 (7th Cir. 1963); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566-67 (8th Cir. 1967); *Kingston v. McGrath,* 232 F.2d 495, 497 (9th Cir. 1956). *See also* Judge Rivers' dissent in *Shipman*, 411 F.2d at 381-82 (5th Cir. 1961) (Rivers, J., dissenting) (consideration of all the evidence is inconsistent with this Court's precedents).

The Fifth Circuit's continued adherence to the *Shipman* standard is also inconsistent with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986). *Anderson* holds that the standards for a directed verdict are the same as those for summary judgment under Rule 56:

> The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." ... and we have noted that the "genuine issue" summary judgment standard is "very close" to the reasonable jury" directed verdict standard: "The primary difference between the two (2) motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." ... In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. [internal citations omitted]

Anderson v. Liberty Lobby, 477 U.S. at 251-252.

Contrary to the Fifth Circuit, some courts hold that the Rule 56 standard also applies under Rule 50. *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1263 (10th Cir. 1998) (stating standard for judgment as a matter of law is essentially identical to "genuine issue" requirement in summary judgment context); *Deimer v. Cincinnati Sub-Zero Prodos*, 58 F.3d 341, 343 (7th Cir. 1995) (stating we now adopt the federal reasonable person's standard across the board: pre-trial, mid-trial, post-trial, and on appeal, for evaluating both the merits and the quantum of relief. Contrary decisions are no longer authoritative); *Schoonejongen v. Curtis Wright Corp.*, 143 F.3d 120, 129 (3rd Cir. 1998) (stating standard for summary judgment is the same standard as standard for motion for judgment as a matter of law).

If the Fifth Circuit had applied the *Anderson* teaching that the Rule 56 standard also governs Rule 50 -- then the Court of Appeals would not have reversed the jury verdict. Statements of age bias by a decision maker would obviously have created "issues of material fact" as to whether age was the reason for the decision.

CONCLUSION

This case presents important questions of the role of the jury in employment discrimination cases. The courts of appeals have taken different approaches on this issue; therefore, review by this Court is warranted.

Respectfully submitted,

JIM WAIDE
MS BAR NO.: 6857

WAIDE, CHANDLER & FLEITAS, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 1357
TUPELO, MISSISSIPPI 38802
(662) 842-7324

Attorneys for Petitioner

No._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

Roger Reeves, *Petitioner*,

vs.

Sanderson Plumbing Products, Inc., *Respondent*.

APPENDIX "A"

JIM WAIDE
MS BAR NO.: 6857

WAIDE, CHANDLER & FLEITAS, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 1357
TUPELO, MS 38802
(662) 842-7324

Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60334

ROGER REEVES,

Plaintiff-Appellee,

versus

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(96-CV-197)

Before HIGGINBOTHAM, JONES and WIENER, Circuit Judges.
Per Curiam:*

In this age discrimination case, Defendant-Appellant Sanderson Plumbing Products, Inc. ("Sanderson") appeals the district court's order denying Sanderson's post-verdict motion for judgments as a matter of law ("JML"), and granting Plaintiff-Appellee Roger Reeves's motion for front pay. After reviewing the record, we conclude that Reeves did not prove a violation of the Age Discrimination in

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Employment Act ("ADEA") by a preponderance of the evidence. Hence, we reverse the district court's order and render judgment in favor of Sanderson.

I

FACTS AND PROCEEDINGS

Fifty-seven year old Reeves was employed for 40 years by Sanderson - a company involved in the manufacture of toilet seats and covers. At the time of his discharge, Reeves worked in a department of the company known as the Hinge Room. The Hinge Room ran a regular line which was supervised by Reeves, and a special line which was supervised by 35 year old Joe Oswalt. Forty-five year old Russell Caldwell was the manager of the department and he supervised both Reeves and Oswalt.

At all times relevant to this case, a union represented Sanderson's production and maintenance employees. The union contract included general work rules, part of which dealt specifically with attendance. Pursuant to these rules, and employee who was absent from work in excess of five percent of his scheduled hours in a month, or who was late twice in a month, was subject to disciplinary action.

As part of his essential duties as a supervisor, Reeves was required to keep daily, weekly, and monthly records of the attendance and tardiness of employees under his control. These records were reviewed by Reeves for accuracy before he passed them on to Caldwell, who then sent them on to data processing.

In the fall of 1993, Sanderson' s Department of Quality Control - under the direction of Powe Chesnut - conducted a review of the operating procedures in the Hinge Room. According to Sanderson, the study revealed productivity problems on Reeves's regular line, stemming from a lax

assembly line operation. As a result, Reeves was placed on a 90-day probation for unsatisfactory work performance.

Nearly three years later, in the summer of 1995, Caldwell informed Chesnut - who by this time had become Director of Manufacturing - that the Hinge Room was again having difficulty meeting its production requirements due to pervasive absenteeism and tardiness. Because the Hinge Room records did not reflect employee attendance problems, however, Chesnut requested that Lucille Reeves, then-Manager of Quality Control, conduct an audit of the department's time sheets. This investigation revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt. Dana Jester, Vice President of Human Resources, conducted an independent review of the records, and confirmed Quality Control's findings. Armed with these results, Chesnut, Jester, and Vice President of Operations Tom Whitaker, recommended to Company President Sandra Sanderson[1] that Caldwell and Reeves be dismissed.[2] Ms. Sanderson - who was 52 years old at the time - heeded this advice, firing both Caldwell and Reeves in October 1995. Thereafter, Sanderson filled Reeves's position, on three successive occasions, with men in their thirties.

In June 1996, Reeves filed suit, claiming that Sanderson terminated him because of his age, in violation of the ADEA. Reeves based his claim on two age-related statements

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[1]The record is uncontradicted that Ms. Sanderson had married Chesnut in December 1988.

[2]Chesnut testified at trial that, had Oswalt not voluntarily terminated his employment several months earlier, Oswalt would have been subject to dismissal along with his co-workers, Reeves and Caldwell.

allegedly made by Chesnut several months before Reeves's dismissal, namely (1) that Reeves was so old that he "must have come over on the Mayflower," and (2) that he was "too damn old to do the job."

At the conclusion of the trial, the jury returned a verdict in favor of Reeves, awarding him $35,000 and finding that Sanderson discriminated willfully on the basis of age in its adverse employment action. After the verdict, Sanderson renewed its previous motion for JML, and moved, in the alternative, for a new trial. At the same time, Reeves filed a motion seeking front pay. The district court denied Sanderson's motions, and entered judgment in favor of Reeves in the amount $70,000 - adding $35,000 in liquidated damages to the jury's compensatory damages in that amount based on the jury's determination of willfulness.[3] In addition, the court awarded Reeves $28,490.80 in front pay, representing two years of lost income. Sanderson timely filed a notice of appeal.

II
ANALYSIS

A. Standard of Review

"A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict."[4] We review the denial of such motions de novo, applying the same standard as the district court.[5] A JML is appropriate if the "facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded"

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[3]See 29 U.S.C. § 626 (b) (1990) (providing that "liquidated damages shall be payable only in cases of willful violations of this Act.").

[4]Harrington v. Harris, 118 F.3d 359, 367 (5th Cir. 1997).

[5]Nichols v. Lewis Grocer, 138 F.3d 563, 565 (5th Cir. 1998).

as the jury did.[6] Applying this standard to the instant case, the district court's judgment should be reversed only if "there is no legally sufficient evidentiary basis for a reasonable jury to find" that Sanderson discharged Reeves because of his age.[7]

B. The ADEA

The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age."[8] To establish a violation of the ADEA, a plaintiff must prove, by a preponderance of the evidence, intentional discrimination on the part of his employer.[9] As direct evidence of discrimination is rare, plaintiffs may rely on indirect evidence and reasonable inferences to establish an ADEA claim under the McDonnell-Douglas burden-shifting analysis.[10]

Under this analysis, a plaintiff must first present a prima facie case, thereby establishing a rebuttable presumption of age discrimination.[11] If the plaintiff meets this burden, the employer must then rebut the presumption by articulating a

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[6]Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 148 (5th Cir. 1995).

[7]Fed. R. Civ. Proc. 50 (a) (1).

[8]29 U.S.C. § 623 (a) (1) (1990).

[9]Price v. Marathon Cheese Corp., 119 F.3d 330, 336 (5th Cir. 1997).

[10]Id.

[11]Id. There are four elements to a prima facie case of discriminatory discharge under the ADEA, including proof that the plaintiff was (1) discharged; (2) qualified for the position; (3) within the protected class at the time of the discharge; and (4) either i) replaced by someone outside the protected class, ii) replaced by someone in the protected class but younger than the plaintiff, or iii) otherwise discharged because of his age. Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

legitimate, nondiscriminatory reason for the challenged employment action.[12] If the employer presents such evidence, then the presumptions of discrimination fades, and the plaintiff must prove that the employer's articulated reason is a pretext for unlawful discrimination.[13]

To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decision-making process.[14] Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to that employment decision.[15] Mere "stray remarks" - i.e., comments which are "vague and remote in time" - however, are insufficient to establish discrimination.[16]

1. Sufficiency of the Evidence

On appeal, Sanderson does not challenge the sufficiency of the evidence supporting Reeves's prima facie case of age discrimination.[17] Rather, Sanderson argues that it articulated a legitimate, nondiscriminatory explanation for firing

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[12]Brown v. CSC Logic, Inc., 82 F.3d 651, 654 (5th Cir. 1996).

[13]Price, 119 F.3d at 337.

[14]Id.

[15]Brown, 82 F.3d at 655.

[16]Id.; Price, 119 F.3d at 337.

[17]Indeed, when, as here, a case has already been tried on the merits, whether the plaintiff properly made out a prima facie case is no longer relevant. United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983). Instead, the important inquiry is whether the plaintiff has "produced sufficient evidence for a jury to find that discrimination has occurred." Walther v. Lone Star Gas Co., 952 F.2d 119, 123 (5th Cir. 1992).

Reeves: Reeves's shoddy record keeping. Because Reeves failed to offer evidence sufficient to prove both that this reason is untrue and that age is what really triggered Reeves's discharge, argues Sanderson, it is entitled to judgment as a matter of law. We agree.

At trial, Chesnut testified that he became aware of timekeeping problems in the Hinge Room after Caldwell - the department manager - complained of inadequate production resulting from absenteeism. This complaint prompted an investigation which uncovered numerous errors in the department's attendance records. Because of specific misrepresentations and errors made by Reeves, argues Sanderson, employees under Reeves's control were being paid for time they did not work, and were not being disciplined for their habitual absenteeism and tardiness. Reeves testified that he was familiar with the company's attendance policy, as well as his timekeeping responsibilities as a supervisor under that policy. In light of this admission, argues Sanderson, Reeves's failure to keep accurate records in accordance with the policy amounts to unsatisfactory work performance, which is a legitimate, nondiscriminatory basis for dismissal.

Reeves attempts to cast suspicion on Sanderson's proffered explanation by first asserting that Sanderson's explanation changed between the time of Reeves's discharge and trial. When he was fired, claims Reeves, he was told that he had caused a specific employee to be paid for time she had not actually worked. In contrast, Reeves argues, Sanderson defended its employment decision at trial by claiming that Reeves's timekeeping mistakes had resulted in the overpayment of numerous employees. Although proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a "red flag"

of pretext,[18] the inconsistency noted by Reeves in this case can hardly be considered mendacious. Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves's work performance was unsatisfactory. That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie.

Reeves goes on, however, to challenge the veracity of Sanderson' allegation that he engaged in inaccurate record keeping at all. At trial, Reeves testified that he was always very careful to ensure that his employees arrived at their work stations on time. In addition, he claimed that any employee who was permitted to clock in early or stay late - and thereby receive additional pay - had extra work assignments to perform. According to Reeves, if any record keeping errors were made, they were the result of Caldwell's inattentiveness and not his own. Moreover, Reeves points out, at trial Chesnut was unable to testify as to the cost to the company, if any, of Reeves's alleged record falsifications. Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decisions was pretextual.

On this point, Reeves very well may be correct. Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

In an attempt to satisfy this burden at trial, Reeves testified that Chesnut - while serving as Director of

[18]Haun v. Ideal Indus., Inc., 81 F.3d 541,546 (5th Cir. 1996).

Manufacturing - made the above-quoted age-related comments just months before Reeves was terminated. As Chesnut was one of three people who recommended his termination to Ms. Sanderson, argues Reeves, Chesnut's comments should be taken as sound evidence of the company's underlying discriminatory motives.

Reeves also expressed the belief that he was treated less favorably than Sanderson's younger employees. This belief, Reeves now claims, is confirmed by Oswalt's testimony that Chesnut treated Reeves like a child. As further evidence of Sanderson's disparate treatment, Reeves points to his 1993 probation, and notes that the 30-something Oswalt was not put on probation despite a similarly lagging production level on the Hinge Room's special line. Likewise, argues Reeves, when Quality Control initiated its investigation of his timekeeping records in 1995, none of the supervisors from other departments were singled out for such scrutiny.

Considering all of the evidence in a light most favorable to Reeves, we nevertheless conclude that there was insufficient evidence for a jury to find that Sanderson discharged Reeves because of his age. Despite the potentially damning nature of Chesnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination. In addition, Chesnut was just one of three individuals who recommended to Ms. Sanderson that Reeves be terminated, and there is no evidence to suggest that any of the other decision makers were motivated by age. In fact, the record shows that at least two of the decision makers were themselves over the age of 50 - Ms. Sanderson at 52, and Jester at 56. Furthermore, the fact remains that, as a result of the 1995 investigation, each of the three Hinge Room supervisors was accused of inaccurate record keeping, including not only Reeves and Caldwell, but 35 year old Oswalt as well. Finally, there is

evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's.

Based on our plenary review, we find that Reeves did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA. For this reason, we reverse and render judgment in favor of Sanderson.

REVERSED AND RENDERED.

Supreme Court, U.S.
FILED
OCT 4 1999
OFFICE OF THE CLERK

No. 99-536

IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TAYLOR B. SMITH
Counsel of Record
MITCHELL, MCNUTT, THREADGILL, SMITH & SAMS, P.A.
Attorneys for Respondent
215 Fifth Street North
P.O. Box 1366
Columbus, MS 39703-1366
(662) 328-2316

155350

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Sanderson Plumbing Products, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Contrary to the Statement of the Case as stated by Petitioner, Roger Reeves, there is much more to be considered with respect to the proceedings. As the record in the lower court will reflect, the Court of Appeals for the Fifth Circuit succinctly and correctly found that a determination must be made at the conclusion of the evidence as to whether one such as Petitioner "presented sufficient evidence that his age motivated Sanderson's employment decision". (Op. at 8(a)).[1] The Court of Appeals then found that there was insufficient evidence for a jury to conclude that Respondent, Sanderson Plumbing Products, Inc., discharged Petitioner because of his age. As will be shown hereinafter, regardless of whether the Court of Appeals for the Fifth Circuit used what Petitioner denominates as "pretext-plus" or "pretext only", the result is the same. This was not a case for submission to a jury and hence, this is not a case for this Court to grant *certiorari* to decide what Petitioner cites as a conflict among the circuits.[2]

After an adverse jury determination in the lower court (and after the lower court overruled Respondent's

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[1] References to the Court of Appeals opinion will be by reference to the page denominations in Petitioner's Appendix.

[2] Indeed, as will be shown hereinafter, the factual scenario in this case does not present to this Court the appropriate case to resolve what the Petitioner contends is a conflict among the circuits. To be sure, the factual setting in this case squarely accommodates both what Petitioner denominates as "pretext-plus", as well as "pretext only". Thus, *certiorari* should not be granted in this case.

Motion for Judgment as a Matter of Law pursuant to Rule 50 of the Fed. R. Civ. Proc.) and after rejection and overruling of Respondent's post-trial Motion for Judgment as a Matter of Law, Respondent appealed to the United States Court of Appeals for the Fifth Circuit and in an opinion rendered on April 22, 1999, the Court of Appeals found there was insufficient evidence to submit the case to a jury. Thereafter, Petitioner filed a Petition for Rehearing *en banc*, which was denied by the Court of Appeals on June 9, 1999.[3]

COUNTER-STATEMENT OF THE FACTS

Respondent is a company involved in the manufacture of toilet seats and covers. (R. Vol. 3 at p. 147). The company has approximately 850 employees and at the time of the trial, the President of the company was Sandra Sanderson. *Id.* at p. 89. Petitioner was a supervisor in a department of the company known as the Hinge Room. (R. Vol. 3 at p. 147). Russell Caldwell, who was 45 years of age, was Manager of the department. (R. Vol. 3 at pp. 153-155). The other supervisor in the department was Joe Oswalt, approximately 35 years of age. (R. Vol. 4 at pp. 210-211). Reeves was terminated on October 23, 1995 for unsatisfactory work performance in his assigned job responsibilities, failure to follow company policy and procedures, and falsification of attendance records of employees under his supervision. Caldwell was also terminated for the same reasons (R. Vol. 3 at pp. 153-155) and if Oswalt had still been employed and had not just quit, he would also have been

[3] Interestingly enough, Point II of Petitioner's argument was never presented to nor considered by the Court of Appeals in Petitioner's Petition for Rehearing, which is in and of itself fatal to Petitioner's argument before this Court on that point.

terminated by Respondent for the same reasons as that of Petitioner and Caldwell. (R. Vol. 4 at pp. 210-211).

I. RESPONDENT'S MANAGERIAL AND EMPLOYEE COMPLEMENT

As clearly shown in the Record, at the time of Reeves' termination, there was one manager who was 68 years old, one manager who was 62 or older, two people who had previously retired from the Company at age 65 in managerial positions and had since returned, one being 72 and the other in the late sixties. There were 20 management people over the age of 50, 12 in the category of 45 to 49 and numerous managers over the age of 60. (R. Vol. 2 at pp. 155-156). This, of course, is significant factual documentation that Petitioner repeatedly, and conveniently, neglects to mention.

II. PETITIONER'S BACKGROUND AND JOB PERFORMANCE

Petitioner acknowledged that one of his main functions as a supervisor was to make sure people under his supervision were at work and on time. (R. Vol. 3 at p. 36). He also further recognized that he was required to note absences or tardiness of employees under his control. (*Id.* at pp. 38-39). Reeves was well familiar with the system and procedure in which he was to report such absences or tardiness and/or the, more or less, fail-safe systems that would come back to him as a supervisor at which time he could make sure he had committed no prior errors. (*Id.* at p. 39-43).

Because of repeated complaints by the Department Manager Caldwell concerning numerous absences, which were not reflected in records being

forwarded to Human Resources, an audit was performed on the Hinge Room. (R. Vol. 4 at pp. 203-204). Numerous errors were found with respect to Oswalt, Reeves, and Caldwell for the months of July, August, and September of 1995. (*Id.* at pp. 205-206, 275-276; Weekly Reports Ex. D-3; Monthly Reports Ex. D-4). A summary of these errors was prepared by persons having no relationship or involvement in the termination of the three. (*Id.* at pp. 277-278; Summary Ex. D-5; Ex. D-5(a)). With respect to Reeves, Caldwell, and Oswalt, simply put, the three, respectively, failed to note and properly reflect that employees were absent or tardy, which allowed employees to bypass disciplinary action. (R. Vol. 3 at pp. 127-128; Vol. 4 at pp. 205-206). Moreover, there were instances where time records were misrepresented or wrongfully adjusted, which resulted in overpayment of employees. (R. Vol. 3 at pp. 127-128). Again, the errors and misrepresentations were summarized by Trial Exhibits D-5 and D-5(a).

Clearly, the legitimate reasons leading to the termination were not only shown to be true but although counsel for Petitioner repeatedly ignores the same, *Petitioner readily admitted that he had made many errors on time records but simply claimed that in his "opinion" that did not warrant dismissal.* (R. Vol. 3 at pp. 51, 61). Petitioner's counsel, on examination of the witness of Respondent who made the audit, commented as follows:

> Then the other people who are listed as employees of the special line, I concede there are numerous violations. (R. Vol 4 at p. 294).

Obviously, this is a very telling admission and is important and one of the many reasons why this case

should not have been submitted to the Jury and why the Court of Appeals is correct!

The much-maligned person Petitioner would denominate as the "culprit", Director of Manufacturing Chesnut, did not make the termination decision but when given the results of the audit, discussed the matter with Tom Whitaker, Vice President of Operations and Dana Jester, the Vice President of Human Resources. (R. Vol. 4 at pp. 208-209). Jester, who was 56 years old at the time (R. Vol. 4 at p. 315), independently reviewed the records. (*Id. at p. 208*). His review confirmed there were numerous instances of errors. *Id.* (*See, also,* R. Vol. 4 at pp. 314, 318-321). Jester recommended termination and in his opinion it was one that needed to be made and was a particularly difficult decision since it not only involved Reeves but also involved Caldwell, whose wife worked for Jester in Human Resources. Nevertheless, age had nothing to do with the decision and the recommendation "was based strictly on job performance". (R. Vol. 4 at p. 315).

Although Jester, Whitaker, and Chesnut independently recommended dismissal, the decision to discharge was made by President, Sandra Sanderson. Clearly, her decision to terminate was in no way related to age. (R. Vol. 3 at pp. 152-153). Indeed, her testimony is so noteworthy that it is recounted here in full:

> When a person manages a company or a department, they have to depend on lower management to do their job. In essence, you have to trust people. You trust them not only to take their numbers to contribute to the profitability of the company, but you have to trust them to report accurate pay

records. The payroll is the largest expenditure a company has. And I trusted that it was being reported accurately by all departments.

This termination was especially difficult because I've known of Roger Reeves since I came to town in 1969. And, of course, I worked with him rather closely sometimes from 1984 until he was terminated. I spent a lot of time on the line talking to Roger Reeves. I think I know Roger quite well. Mr. Caldwell has not been with the company long, but he's a very likeable person. His wife is also employed by our Human Resources Department, and she's a very valuable employee. So that also, you know, I had to think about that too.

But the fact remained we had evidence or evidence was presented to me that in my opinion Mr. Reeves, Roger, had not done his job properly. He had not coded employees properly so that they could be disciplined according to our union contract. This can cause us a problem if we could have a grievance or an unfair labor practice. In one department, if you don't discipline people per the contract and you do in another department.

Then there was the fact that we were actually paying people for not working. How long this had been going on? Was this just a three-month window? I don't know. It could have been going on a long time. I trusted that everyone was doing the time

sheets correctly. And they were going to data processing, not once but many times. And Roger has heard me, and so has Russell and everyone in that company, stress Sanderson's consistency in your disciplinary actions and accuracy on your payroll numbers. Do the daily time sheets.

So, it was a difficult decision. You never want to lose a long-term employee. You lose experience, you lose knowledge. It's a loss to the company. But a superior or manager or director has to set an example for the employees that they supervise. These employee knew that they were being -- those that were being overpaid, they knew that. These employees knew when they were late and they knew when they were not disciplined. And this was the example being set for them, well, we can get by with this. Management has to present an example. They have to be the example and the leader to follow.

So, faced with what was presented to me, I decided that this was justifiable grounds for termination, not only for one who did not code it correct, who did not properly administer the payroll records, but also for his manager who approved his actions. No, I didn't want to do it. And sitting here today, you know, I wish I weren't sitting here, but I honestly feel like I did the right thing. And I feel like if anyone in my position and anyone in another company falsified company records it's grounds for

termination. But age had nothing to do with it.

(R. Vol. 3 at pp. 153-155).

In addition to Petitioner's problems in 1995 that led to his dismissal, in 1993, a study was made of the Hinge Room, which concluded that Reeves' line was very lax, people were not being made to follow general work rules, employees were late returning from break, and employees took unscheduled breaks. (R. Vol. 4 at p. 198). As a result, Russell Caldwell and then Director of Manufacturing Everett Livingston (not Chesnut), placed Petitioner on probation for unsatisfactory work performance, which included, among other things, not counseling people or writing up people for coming in late and not following the absentee policy.[4] (R. Vol. 4 at pp. 198-199).

III. ALLEGED AGE COMMENTS AND PROOF OF DISCRIMINATION

Out of 379 pages of trial testimony, Petitioner's only "evidence" of age are two alleged comments attributed to Powe Chesnut, as clearly found by the Court of Appeals to be only one of four decision-makers. Petitioner testified in this regard as follows:

> One comment he made I was so old I must have come over on the Mayflower. Another one, I was working on a machine, walked

[4] Chesnut was not involved in placing Petitioner on probation and subsequent to his being placed on probation, and after Chesnut became the Director of Manufacturing, the latter gave Petitioner a wage increase and at a time when Petitioner was 55 years old. (R. Vol. 3 at p. 65).

> up to me, I couldn't get it running, told me I was too damn old to do my job.[5]

(R. Vol. 3 at p. 26).

According to Petitioner, these were statements made to him not by the decision-maker Ms. Sanderson – but by Chesnut, only one of the three who made the recommendation to the President of the company to terminate and he supposedly was informed by Mr. Chesnut two months before he was dismissed in this regard. *(R. Vol. 3 at p. 26)*. Chesnut denied making the statement with reference to Petitioner being "too old for the job" and denied making any comment relative to "the Mayflower". *(R. Vol. 4 at pp. 215-216)*. It is significant here and it is uncontradicted that nicknames were frequently used and that, for instance, Chesnut stated that he was referred to as the "walking boss". Moreover, there was an employee who worked out on the regular line (where Reeves was supervisor) for many years who was referred to as "the old man". As a matter of fact,

[5] It is, of course, noteworthy that at the trial Reeves admitted that the reference to the Mayflower was only said to him one time and he does not remember the date this statement was made. *(R. Vol. 3 at p. 59)*. He was further reminded that in his deposition he never mentioned that he had been informed by Chesnut that he was too old to do the job but only made reference that on one occasion, Chesnut mentioned that he must have come over on the Mayflower. Indeed, Reeves was reminded of the fact that in his deposition, he was asked other than the Mayflower statement was there anything else stated and his answer was "I don't know of anything else". Indeed, at the trial, Reeves admitted this was true "at that time". *(R. Vol. 3 at p. 60)*. Reeves was never able to explain this obvious discrepancy in his testimony -- and yet he was under oath on both occasions!

Roger Reeves referred to this employee (John Williams) as the old man and that's basically all he ever called him. *(R. Vol. 4 at p. 215).*[6] Indeed, at Sanderson Plumbing, there are a lot of people who have retired and who have come back to work on a part-time basis. Many of them are often referred to as the old man. *(R. Vol. 4 at p. 216).* One employee named Clyde Cook retired when he was 62 years of age but returned and continues to work and is now 73 and is often referred to by the employees as the old man. *(R. Vol. 4 at p. 216).*

Additionally, Lucille Reeves, who was not involved in either the recommendation to terminate or the termination, stated also that the company is known for its nicknames. Her name is Lucille but her nickname is "Sill" and she referred to a Manager there who is referred to as "Snake". She pointed out their Personnel Manager is referred to as "that woman" and she also corroborated the fact that Reeves would call an employee by the name of John Williams "old man". *(R. Vol. 4 at p. 280).*

It is uncontradicted that Mrs. Sanderson, the person who terminated Petitioner, had no information as to whether Chesnut ever made such a statement to Reeves (R. Vol. 3 at p. 160) because quite frankly that was not a factor in her decision. (R. Vol. 3 at pp. 152-153).

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[6] The Court should be mindful of the fact that after Chesnut and Lucille Reeves testified *Petitioner took the stand on rebuttal but never denied referring to Mr. Williams as "the old man" -- yet Reeves now wants to attribute much to the alleged statements of Chesnut -- also again, not the person who terminated Petitioner!*

Thus, upon reflection, it is clear that not only was there no showing of the second prong of the pretext standard - evidence of age discrimination - but no jury question as to pretext on the first prong - matters relating to the articulated reason for the discharge.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED INASMUCH AS THE DETERMINATION OF THE FIFTH CIRCUIT OF NO JURY ISSUE WAS SUPPORTED BY THE UNDISPUTED FACTS AND THE APPLICABLE LAW OF ALL CIRCUITS.

Petitioner, initially, would have this Court refer to only one statement from St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). (*Pet. for Writ of Cert. at p. 4*).

This Court in St. Mary's reaffirmed that once a *prima facie* case is established, then the burden of production shifts to the defendant although the burden of persuasion always remains with the plaintiff. *Id. at* 507. Moreover, St. Mary's held that once the employer meets this burden, then the presumption made by the *prima facie* showing "drops out of the picture", *Id.* at 511, and, indeed, is "no longer relevant". *Id.* at 510-11; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255, n.10 (1981). To be sure, as set forth in St. Mary's, once a defendant sets forth the legitimate, nondiscriminatory reason (there is no issue in the case *sub judice* in this regard), a plaintiff must demonstrate "that the proffered reason was not the true reason for the employment decision and that race was". St. Mary's at 508. Indeed, the court in St. Mary's made it clear that one such as

Petitioner has the burden to show that the proffered reason was false and *that the real reason was discrimination*. *Id.* at 515. Your Honors have further reminded that "it is not enough ... to disbelieve the employer".[7] *Id.* at 519. Finally, St. Mary's held that a reason cannot be proved to be a pretext for discrimination unless it is shown "both that the reason was false and that discrimination was the real reason". *Id.* at 515.

The significance of the above discussion from St. Mary's is important when considering Petitioner's argument that since there is a conflict among the circuits relative to "pretext-plus" and "pretext only", the Court should grant *certiorari* in this case to resolve this alleged conflict.

However, the significant point is that even under what Petitioner has denominated as the "pretext only" rule, Petitioner was not entitled to a jury determination of the case *sub judice*. To be sure, Manzer v. Diamond Shamrock, 29 F.3d 1078 (6th Cir. 1994) would represent perhaps what Petitioner denominates as a "pretext only"

[7] Just as Petitioner seeks to read St. Mary's out of context, the Court in St. Mary's clearly pointed out that there was no inconsistency between the statement that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" and the Court's later statements that (1) the plaintiff must show "both that the reason was false and that discrimination was the real reason" and (2) that "it is not enough to disbelieve the employer". As the Court clearly opined in order to reject the defendant's proffered reason as enough to sustain a finding of discrimination, *there must be a finding of discrimination*. *Id.* at 511, n.4. To be sure, and as shown throughout in the case *sub judice*, there was no such evidence upon which to base such a finding.

circuit. The significance of Manzer is that in showing pretext and to make a case on the credibility of the employer's explanation, the plaintiff is required to show by the preponderance of the evidence either:

> ... (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge. ... That the first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, *i.e.*, that they are factually false. ... The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttals are direct attacks on the credibility of the employer's proffered motivation for firing Petitioner and, if shown, provide an evidentiary basis for what the Supreme Court has termed a suspicion of mendacity....
>
> The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal.... In such cases, the plaintiff attempts to indict the credibility of

> his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. ...

29 F.3d 1084.

Indeed, Manzer stated as follows that:

> If the bare bones elements of a plaintiff's *prima facie* case was sufficient to make this showing, however, the entire burden-shifting analysis of McDonnell Douglas and its successors would be illusory. No case could ever be culled out after the *prima facie* stage and every case would have to be determined by a jury. We do not believe that this was the intent of Congress or the outcome envisioned by the Supreme Court in its long line of cases implementing employment discrimination legislation. Accordingly, we hold that, in order to make this type of rebuttal showing, the plaintiff may not simply rely upon his *prima facie* evidence but must, instead, introduce additional evidence of age discrimination.

29 F.3d 1084.

Thus, even in a circuit that is, as Plaintiff would have us believe, a "pretext-only" circuit, there still is insufficient factual underpinning in the case *sub judice* to warrant submission to a jury.

Thus, using this standard, it is clear that Petitioner is entitled to no relief and the Writ should be denied. For instance, with respect to Point 1 (that the proffered

reasons had no basis in fact), there is no doubt and it is undisputed that not only Petitioner but the two other management employees in his department committed the infractions in question, which led to the discharge of Petitioner's supervisor and would have led to the discharge of the younger supervisor had he still been employed there. With respect to Point 2 (that the proffered reasons did not actually motivate his discharge), there is no showing at all to the contrary, no evidence to the contrary, and indeed, the factual background relative to the termination of the younger supervisor over Petitioner and the fact that the 35-year-old supervisor would have been terminated had he been there, plus the numerous instances by statistics of employees over 50 in supervisory positions clearly defeat any attempt of Petitioner to show that there was a factual issue that "the proffered reasons did not actually motivate his discharge". With respect to Point 3 (that the proffered reasons were insufficient to motivate discharge), obviously, there is no issue here and Petitioner does not even attempt to contend that the numerous errors made not only by Petitioner but his two colleagues in the department would have been and were insufficient to motivate discharge.[8]

Other circuits referred to by Petitioner as "pretext only" circuits have adopted the same analysis as Manzer and each require some showing of discrimination. *See,* Jackson v. E.J. Brach Corp., 176 F.3d 971, 983 (7th Cir. 1999). (Indirect evidence of pretext showing that an

[8] In this regard, it is again more than noteworthy to recall that Petitioner's own counsel, during examination, conceded that the violations committed in the same department by Petitioner's young, supervisor colleague (age 35) were "numerous violations". (R. Vol. 4 at p. 294).

employer's proffered reasons are not credible may be made by demonstrating that the reasons are factually baseless, were not the actual motivation for the discharge, or were insufficient to motivate the discharge.) Moreover, in Pilditch v. Bd. of Educ. of City of Chicago, 3 F.3d 1113 (7th Cir. 1993), the Seventh Circuit stated that under Hicks a plaintiff "is left to unmask, if he can, the reasons proffered by the employer as fake. Beyond this, he must also prove that the true reason for his firing was discriminatory". *Id.* at 1117-1118. Also, *see*, Shorter v. ICG Holdings, ___ F.3d ____, (1999 LEXIS 19279 at *9-10 (10th Cir. 1999)) (a plaintiff can establish pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence). Thus, these circuits have adopted the same reading as the Sixth Circuit in Manzer.

While Petitioner abandons any argument that there was direct evidence of discrimination (*see p. 7 of the Petition wherein Petitioner concedes that "because of the unavailability of direct evidence, this Court adopted the indirect burden-shifting method of proof*), in any event, the alleged statement attributed to Powe Chesnut is inadequate. All circuits are in agreement on this. *See, e.g.*, Opinion of Fifth Circuit at p. 6A of Appendix (stray remarks, i.e., comments that are vague and remote in time are insufficient to establish discrimination); Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1995) (statements must be proximate in time to the terminations and related to the employment decision at issue, otherwise, a stray remark); Hoffman v. MCA, Inc., 144 F.3d 1117, 1121-22 (7th Cir. 1998) (in order to raise a genuine issue of material fact under the direct method of proving age discrimination, defendant's comments on which plaintiff relies must be contemporaneous with and

related to the firing, and made by the decision-maker); Shorter v. ICG Holdings, cited *supra* at *5-7, 14 (plaintiff must still show some nexus between the statements and the defendant's decision to terminate the employee); Simmons v. OCÉ-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999) (absent a causal link between the racial comments and the adverse employment decision, statements classified as statements by a decision-maker, are best classified as unrelated to the decisional process); *See, also,* Davidson v. Quorum Health Group, Inc., 1 F.Supp.2d 1321, 1325 (N.D.Ala. 1997); Smith v. The Thresholds, 1999 WL 410030 at *7 (N.D.Ill. 1999).

Simmons v. OCÉ-USA, Inc., cited *supra*, clearly sets forth a logic which applies with full force to the case *sub judice* when the Eighth Circuit held:

> Given the comprehensive objective evidence presented by OCÉ of Simmons' poor job performance, the offensive remarks made by Curless outside of the decision-making process, without more, are not enough to create a trial-worthy issue of pretext.

174 F.3d at 916.

To be sure, that is the identical situation with Petitioner's admission of violations of company policy and rules set forth early in the factual scenario of this brief (including the admission by Petitioner's counsel that identical infractions committed by the "younger" Oswalt were serious violations). Thus, the alleged age comments of what is really a non-decision-maker, Powe Chesnut (but if we accept Petitioner's argument only one of four decision-makers), does not constitute evidence that would create a jury issue.

Thus, again, and under any standard elicited, Petitioner's argument fails and the holding of the Court of Appeals for the Fifth Circuit was appropriate.

II.

THE FIFTH CIRCUIT'S APPROACH OF WEIGHING ALL THE EVIDENCE WAS NOT INAPPROPRIATE NOR WAS ITS STANDARD FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50 INAPPROPRIATE.

Initially, the Court must be mindful that here Petitioner raises an issue not raised in the Court of Appeals on Petitioner's Petition for Rehearing *en banc*. Indeed, the only issue raised by the Petitioner before the Court of Appeals on rehearing was the argument that "By finding that age-based comments by the person who caused the termination decision, near in point of time to the termination decision, was insufficient evidence of age discrimination, the panel contravened decisions of this court". (Pet. for Rehearing *en banc*, p. 7).[9] This Court has long held that it will decline to consider questions presented in the Petition for Writ of *Certiorari* that have not been considered by the lower court. *See, e.g.*, Tacon v. State of Arizona, 410 U.S. 351, 352 (1973) and Patrick v. Burget, 486 U.S. 94, 99, n.5 (1988).

Even if the Court considers this argument, Petitioner's argument on the merits is insufficient. Petitioner argues that the McDonnell Douglas methodology should prevail throughout. However, this

[9] Excerpts from Petitioner's Petition for Rehearing *en banc* showing the only issue presented and the argument is attached hereto as Appendix A to this Response.

Court has repeatedly held that such is not the case. In St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 519, wherein this Court held:

> ... The McDonnell Douglas methodology was never intended to be rigid, mechanized, or ritualistic.... Rather, once the defendant has responded to the plaintiff's *prima facie* case, the district court has before it all the evidence it needs to decide not (as the dissent would have it) whether defendant's response is credible but whether the defendant intentionally discriminated against the plaintiff.

Thus, in essence, to follow the mandates of St. Mary's and regardless of whether there is a distinction between "pretext-plus" and "pretext only", evidence presented both by a plaintiff and a defendant must be considered in order to determine whether or not McDonnell Douglas methodology has been exhausted. Indeed, in employment discrimination cases, the Court is called upon to make a determination as to whether there is a factual issue that the defendant intentionally discriminated against the plaintiff and at the point in which the District Judge was presented with Respondent's Motion for Judgment as a Matter of Law and at the point in which consideration was given to the appeal by the Court of Appeals for the Fifth Circuit, the only question then was to decide whether there was evidence that "the Defendant intentionally discriminated against the Plaintiff". U.S. Postal Serv. Bd. of Govenors v. Aikens, 460 U.S. 711, 715 (1983). Thus, regardless of whether the Court should consider all the evidence or just the evidence in support of the nonmovant is immaterial in this case when we recall that under either

standard (as enunciated earlier in this Response) there was insufficient evidence of pretext to submit the issue to the jury. Further comment here would reiterate the obvious.

CONCLUSION

When all is said and done, the Petition fails to warrant the grant of a Writ in this case. In essence, what Petitioner really complains of is that he did not think the decision of his employer was correct and did not think that his ignoring and violating work rules of his employer should have mandated discharge. Petitioner presupposes that Respondent did not like him. Of course, it is beyond dispute that dislike is not enough to prove pretext. Waggoner v. City of Garland, Tex., 987 F.2d 1160, 1165-66 (5th Cir. 1993); Grimes v. Tex. Dept. of Mental Health, 102 F.3d 137, 143 (5th Cir. 1996). Moreover, *The Age Discrimination Act* was never intended to be a vehicle for judicial second-guessing of business decisions nor was it intended to transform the courts into personnel managers. *See, e.g.*, Ross v. Univ. of Tex. San Antonio, 139 F.3d 521, 527 (5th Cir. 1998). Perhaps the Second Circuit in Norton v. Sam's Club, 145 F.3d 114 (2nd Cir. 1998) provided clear insight to the role properly accepted by the Court of Appeals for the Fifth Circuit in finding no jury issue when it stated:

> ... [F]iring someone for taking a long lunch on a day when he was coping with serious family problems might seem to some to be unduly harsh, but the ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating, for firing people on account of their age. The Record in the instant case

> is devoid of evidence, direct or circumstantial, sufficient to support a finding that Sam's Club fired Norton because of his age.

Id. at 119.

Simply put, the Petition is without merit and should be denied.

Respectfully submitted,

TAYLOR B. SMITH
Counsel of Record
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Attorneys for Respondent
215 Fifth Street North
P.O. Box 1366
Columbus, MS 39703-1366
(662) 328-2316

APPENDIX

APPENDIX — PETITION FOR REHEARING EN BANC DATED MAY 20, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAUSE NO. 98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

PETITION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION HONORABLE L.T. SENTER, JR., UNITED STATES DISTRICT JUDGE

JIM WAIDE
MSB NO. 6857

WAIDE, CHANDLER & FLEITAS, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 1357
TUPELO, MISSISSIPPI 38802
662-842-7324

Attorneys for Plaintiff/Appellee

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant

Defendant/Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel for the Plaintiff/Appellee, does hereby certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Roger Reeves, Plaintiff/Appellee;

2. Jim Waide, Attorney for Plaintiff/Appellee;

3. Sanderson Plumbing Products, Inc., Defendant/ Appellant; and

4. Taylor B. Smith, Attorney for Defendant/ Appellant.

JIM WAIDE

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF COUNSEL AS TO GROUNDS
FOR EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following panel decisions of the United States Court of Appeals for the Fifth Circuit or the Supreme Court of the United States:

Smith v. Berry Co., 165 F.3d 390, 395 (5th Cir. 1999);

Portis v. First Natl. Bank of New Albany, Mississippi, 34 F.3d 325, 329 (5th Cir. 1994);

Weaver v. Amoco Prod. Co., 66 F.3d 85, 86-87 (5th Cir. 1995);

Woodhouse v. Magnolia Hosp., 92 F.3d 248 (5th Cir. 1996);

Ray v. Iuka Municipal Sep. School Dist., 51 F.3d 1246, 1250 (5th Cir. 1995); and

EEOC v. Manville Sales Corp., 27 F.3d 1089, 1094 (5th Cir. 1994).

JIM WAIDE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. What evidence is necessary to constitute "substantial evidence" in order to permit a jury to decide an age discrimination case?

2. Is evidence of pretext, coupled with evidence of age bias by the person who caused the adverse decision, sufficient evidence of age discrimination so as to permit the jury to decide whether there has been age discrimination?

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3. May the Court of Appeals, in reviewing a jury verdict "balance" the factors it considers to be indicative of no age discrimination, against the factors the jury found to constitute age discrimination?

4. Did the panel's decision in this cause contravene this Court's previous teachings as to the required proof necessary to present a jury issue in an age discrimination case?

JIM WAIDE

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF THE ISSUES

5. What evidence is necessary to constitute "substantial evidence" in order to permit a jury to decide an age discrimination case?

6. Is evidence of pretext, coupled with evidence of age bias by the person who caused the adverse decision, sufficient evidence of age discrimination so as to permit the jury to decide whether there has been age discrimination?

7. May the Court of Appeals, in reviewing a jury verdict "balance" the factors it considers to be indicative of no age discrimination, against the factors the jury found to constitute age discrimination?

8. Did the panel's decision in this cause contravene this Court's previous teachings as to the required proof necessary to present a jury issue in an age discrimination case?

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF THE PROCEEDINGS AND DISPOSITION OF THE CASE

A jury in the Northern District of Mississippi found the Defendant guilty of willful age discrimination and awarded a judgment of Seventy Thousand Dollars ($70,000.00). R., Vol. 2, p. 275. The trial court denied Defendant's Motion for Judgment as a Matter of Law. R., Vol. 2, p. 287. Defendant appealed to this Court. R., Vol. 2, p. 290.

On appeal, the panel found evidence of pretext, and also found that one of the decision makers had made age-biased statements. Nevertheless, the panel concluded there was insufficient evidence to present a jury question in view of the ages of other managerial employees, and in

view of the age of other persons involved in the discharge decision.[1]

FACTS

Plaintiff Roger Reeves worked for the Defendant or its predecessor for forty (40) years, the last twenty (20) as a supervisor. He was fired at age fifty-seven (57). R., Vol. 3, p. 1-4.

According to Plaintiff's evidence, the "absolute power" of the company was Powe Chestnut the husband of the owner. R., Vol. 3, pp. 4, 80-84. Chestnut was Director of Manufacturing in 1995 when Plaintiff was fired. However, even before he received this position, he had written his supposed supervisor a note containing profanity and instructing his so-called boss, the Director of Manufacturing, to "wake up" and learn to do his job. R., Vol. 3, pp. 109-110, 113; R., Vol. 4, p. 220, Exhibit P-7.

Records introduced at trial indicate Plaintiff's productivity was superior to any other supervisors with whom he was compared. For example, his productivity compared favorably to the thirty-five (35) year old supervisor on the "regular line". R., Vol. 3, pp. 78-79.

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1. This was a factual error by the panel. A jury was entitled to find the person who actually caused Plaintiff's discharge was Powe Chestnut, the individual who made the age-biased statements. R., Vol. 3, pp. 109-110; R., Vol. 4, p. 220, Exhibit P-7.

According to the testimony at trial, Powe Chestnut, the "absolute power" at the plant, treated the Plaintiff "like a child". R., Vol. 3, pp. 80-83. While Chestnut was abusive to employees generally, this treatment was "nothing compared" to the way Chestnut treated Plaintiff. R., Vol. 3, pp. 82-83.

At the end of 1993, Plaintiff was placed on probation by Chestnut, based on Chestnut's claim that productivity was down. However, production records demonstrated Reeves' productivity exceeded those of the younger supervisor, Oswalt, who was not placed on probation. R., Vol. 4, p. 226.

At trial, Chestnut testified that he did not make the decision to put Plaintiff on probation. R., Vol. 3, pp. 198-199, R., Vol. 4, p. 235. However, Plaintiff introduced an affidavit signed by Chestnut stating he is the person who recommended Plaintiff for probation in 1993. R., Vol. 4, pp. 235-237.

After being placed on probation in 1993, Plaintiff's productivity increased even further, and he received a merit pay raise. R., Vol. 3, pp. 16-17, 65, 113.

At the time of Plaintiff's termination his productivity "goal" was forty-eight (48) units per man hour, but he was running sixty (60) units per man hour. R., Vol. 3, pp. 16-17.

Approximately two (2) months before Plaintiff was terminated, Chestnut approached him when he was trying

to get a machine running and told him that he was "too damn old to do the job". R., Vol. 3, pp. 26-59. This preceded an earlier comment by Chestnut that Plaintiff was "so old that he must have come over on the Mayflower". R., Vol. 3, pp. 26, 59.

Chestnut did not deny the age-based comments, but testified that he was only joking. R., Vol. 4, pp. 214-216.

According to Reeves, the only reason given him for discharge at the time of trial was that he had caused an employee (Coley) to be paid for two (2) days when she was not working. R., Vol. 3, pp. 30-55. This was an unprecedented reason, since normal practice was to take any overpayment out of the employee's check. R., Vol. 3, pp. 72-73.

This error in overpaying Coley was not Plaintiff's fault. Plaintiff was actually in the hospital on the two (2) days for which Coley was claimed to have been erroneously paid. In fact, it was Plaintiff's immediate supervisor, Caldwell, who had made this error. Plaintiff merely delivered the contents of a note from Caldwell to the company office. R., Vol. 3, p. 23. Caldwell, age forty-five (45), was fired at the same time as Plaintiff. R., Vol. 3, p. 151; R., Vol. 4, p. 209.

At the time of trial, Defendant had used three (3) replacements for Plaintiff. All were in their thirties. R., Vol. 3, p. 101-102, R, Vol. 4, p. 224.

Defendant anticipated, and actually had, a loss of productivity after Plaintiff's absence. According to Ms. Sanderson, owner of the company, and husband of Chestnut, there will always be a "learning curve" when a new supervisor takes over. R., Vol. 3, p. 102.

Contrary to the reason given when Plaintiff was discharged, the defense at trial was that Plaintiff was fired because an "investigation" had revealed that he was causing numerous employees to be overpaid or was not properly "writing them up" when they were absent or tardy. According to the Defendant, failure to write up absent or tardy employees was a "falsification" of company records which justified discharge. R., Vol. 3, pp. 113, 115, 119.

Plaintiff vigorously disputed the Defendant's claims that any employees were late, and testified that he made certain that the workers were on time. R., Vol. 3, pp. 18-19, 73; R., Vol. 4, pp. 241-245, 246-249. Furthermore, the individual responsible for preparing writeups was Plaintiff's forty-five (45) years old supervisor. R., Vol. 3, pp. 20-21.

At trial, the Defendant claimed the termination decision was made by Chestnut's wife, Mrs. Sanderson, on the recommendation of Chestnut and others. R., Vol. 3, pp. 114-115, 150-151; R., Vol. 4, pp. 209-220. This was inconsistent with the corporate deposition where the Defendant testified that four (4) people, including Chestnut, made the decision. R., Vol. 3, pp. 157-158. Chestnut alone initiated and directed the "investigation"

which caused Plaintiff's termination. R., Vol. 3, pp. 158-184; R., Vol. 4, pp. 185-203. Of the persons who participated in the termination decision, the only person familiar with the investigation was Chestnut. R., Vol. 3, p. 159. Furthermore, Chestnut "ran the plant" and was the "absolute power". R., Vol. 3, p. 8.

PANEL DECISION

The panel agreed that Plaintiff produced sufficient evidence of pretext. The panel wrote:

> " . . . Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. "On this point, Reeves may very well be correct."

Opinion, p. 9.

However, the panel then concluded that, even so, the evidence was not sufficient. The panel wrote:

> "Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision".

Opinion, p. 9.

The panel then concluded there was insufficient evidence of age discrimination because the comments by Chestnut were not made "in the direct context of Reeves' termination", panel Opinion, p. 10, because two (2) of the decision makers[2] were over fifty (50), panel Opinion, p. 10, and because the company retained people in management who were over the age of fifty (50), "including several employees in their late sixties". Panel Opinion, p. 11.

Plaintiff believes that this type of analysis constitutes a forbidden "balancing" of the evidence and undermines the Seventh Amendment of the United States Constitution guaranteeing the right to jury trial. The panel's holding is inconsistent with many of this Court's precedents.

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2. As earlier stated, the panel's finding that other decision makers were in their fifties is misleading. There was ample evidence from which a jury could find Powe Chestnut, who made the age-biased statements, was the person who caused the Plaintiff to be fired. R., Vol. 3, pp. 109-110, 113; R., Vol. 4, p. 226, Exhibit P-7.

Appendix

ARGUMENT

BY FINDING THAT AGE-BASED COMMENTS BY THE PERSON WHO "CAUSED" THE TERMINATION DECISION, NEAR IN POINT OF TIME TO THE TERMINATION DECISION, WAS INSUFFICIENT EVIDENCE OF AGE DISCRIMINATION, THE PANEL CONTRAVENED DECISIONS OF THIS COURT. ACCORDINGLY, PLAINTIFF REQUESTS EN BANC CONSIDERATION WHEREIN THIS COURT CAN CLEARLY DELINEATE WHAT A PLAINTIFF NEED DO TO PRESENT A JURY ISSUE IN AN AGE DISCRIMINATION CASE.

In *Rhodes v. Guiberson Oil & Tool*, 39 F.3d 537 (5th Cir. 1996), this Court announced a "pretext plus" test. Under this test for age discrimination, it was necessary for Plaintiff to produce proof of both pretext and direct evidence of age discrimination. However, *Rhodes* was reversed en banc, with this Court holding that independent direct evidence of age discrimination is necessary only in some, not in all, cases. *See Rhodes*, en banc, 75 F.3d at 994.

This case was one of those cases where the evidence of "pretext" was held to be insufficient evidence of age discrimination. Thus, the panel determined some additional evidence of age discrimination was necessary. The only other evidence of age discrimination was Plaintiff's being treated differently from younger persons

Appendix

and the "age-based statements" by a decision maker. The panel held such evidence insufficient when compared to contrary evidence.

In this regard, the panel's decision cannot be squared with the decisions of other panels. Even where there has not been shown any evidence of pretext, and age-based statements are the *only* evidence of age discrimination, some panels have held this evidence is sufficient. Furthermore, where evidence of age-biased statements have existed, other panels have not "balanced" contrary evidence. These panels have acted consistently with the rule of *Boeing v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1961), which requires the *jury*, not the court of appeals, to balance the evidence.

In *Weaver v. Amoco Prod. Co.*, 66 F.3d 35, 86-87 (5th Cir. 1995), plaintiff, one of five (5) supervisors who had been laid off during a reduction in force, produced no evidence of age discrimination other than that a supervisor had agreed with plaintiff's statement that "a guy my age doesn't have much future left". This statement in *Weaver* is less direct than that involved in this case, and yet was held sufficient evidence to present a jury issue on the age discrimination issue. Furthermore, the *Weaver* panel did not balance the defense's evidence against the age-based statement.

In *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996), the President of the board of trustees of the hospital had said that "old people" would be one group who would be chosen for a layoff. This Court held that

such a statement could constitute "substantial evidence" of age discrimination, even though the president of the board was not involved in choosing plaintiff for the layoff.

In *Portis v. First National Bank of New Albany, Mississippi*, 34 F.3d 325, 329 (5th Cir. 1994), plaintiff's supervisor's statement that plaintiff would be paid less because she was a woman was held as evidence of sex discrimination in a demotion case, even though this statement was unrelated to the demotion decision in issue.

Smith v. Berry Co., 165 F.3d 390, 394 (5th Cir. 1999) held that a memorandum by a company president referring to older employees as a "very difficult group", was evidence of age discrimination, although the memo predated the discharge decision by six (6) years, and there was no evidence that this statement related to plaintiff.

Ray v. Iuka Municipal Sep. School Dist., 51 F.3d 1246, 1250 (5th Cir. 1995) found substantial evidence of a retaliatory motive from a statement made by one member of a school board, even though the case contained no evidence of any such discriminatory statements by a majority of the board, which made the discharge decision.

EEOC v. Manville Sales Corp., 27 F.3d 1089, 1094 (5th Cir. 1994) held that various age-based comments by a district manager over a four (4) year period referring to plaintiff as an "old man was substantial evidence of age discrimination, even though the district manager, as did Chestnut, only recommended the discharge. This Court said that such statements could be "highly probative of discriminatory intent". 27 F.3d 1089.

In balancing the defense evidence against the evidence of age discrimination, the panel relied on the employer's retaining several employees [over fifty (50)], including "several employees in their late sixties". Panel Opinion, p. 11. Holding it a defense that the company retained many older employees ignores *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 81 L.Ed.2d 718, 729, 104 S.Ct. 2794 (1984) which said:

> "A racially balanced work force cannot immunize an employer for liability for specific acts of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. at 579, 57 L.Ed.2d 957, 98 S.Ct. 2943 . . . 'A piece of fruit may well be bruised without being rotten to the core'."

81 L.Ed.2d at 729.

By finding that evidence of the ages of other employees retained, overcame Plaintiff's evidence of age discrimination, the panel not only impermissibly "balanced" the evidence, but disregarded this applicable teaching of the Supreme Court.

CONCLUSION

The evidence in this case is impossible to distinguish from that relied upon by several other panels in upholding jury verdicts. There is little justice when plaintiffs, under practically identical facts, may obtain a jury's consideration but Reeves may not. To maintain

consistency of decisions and to protect the Seventh Amendment of a right to trial by jury, this case should be reheard en banc.

Respectfully submitted,

BY: _____
JIM WAIDE
MSB NO. 6857

WAIDE, CHANDLER & FLEITAS, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 1357
TUPELO, MISSISSIPPI 38802
662-842-7324

Attorneys for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Taylor B. Smith, Esq.
Mitchell, McNutt, Threadgill,
Smith & Sams
Post Office Box 1366
Columbus, Mississippi 39703-1366

THIS the 20 day of May, 1999.

_____
JIM WAIDE

(17)

No. 99-536

Supreme Court, U.S.
FILED
JAN 7 2
CLERK

In The

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

*Jim Waide
David A. Chandler
Waide, Chandler & Fleitas, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, MS 38802
(662) 842-7324
Counsel for Petitioner
**Counsel of Record*

*Taylor B. Smith
Mitchell, McNutt, Threadgill, Smith & Sams, P.A.
Post Office Box 1366
Columbus, MS 39703
(662) 328-2316
Counsel for Respondent

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RELEVANT DOCKET ENTRIES

U.S. District Court
Northern District of Mississippi (Eastern)

CIVIL DOCKET FOR CASE #:96-CV-197

6/28/96	1	COMPLAINT for job discrimination (age) FILING FEE $120 RECEIPT #43856; jury demand (jsw)
6/28/96	–	**Set Jury Flag (jsw)
6/28/96	–	NOTICE OF ASSIGNMENT Chief Judge L. T. Senter Jr. and Magistrate Judge Jerry A. Davis (jsw)
6/28/96	–	SUMMONS (ES) issued for Sanderson Plmbg Prod (jsw)
7/3/96	–	NOTICE of Intent to Serve Subpoena Duces Tecum by Roger Reeves (rke)
7/9/96	2	NOTICE OF SERVICE of pre-discovery disclosure by Roger Reeves to Sanderson Plmbg Prod (dlh)
7/9/96	3	REQUEST FOR WAIVER of Service as to Sanderson Plmbg Prod 7/8/96 Waiver of Service due by 8/7/96 for Sanderson Plmbg Prod (dlh)
7/15/96	4	WAIVER OF SERVICE Returned Executed as to Sanderson Plmbg Prod 7/8/96 Answer due on 9/6/96 for Sanderson Plmbg Prod (dlh)
7/15/96	5	PROOF OF SERVICE of Subpoena by Roger Reeves Subpoena served on Tom Lord (dlh)

9/5/96	6	ANSWER to Complaint by Sanderson Plmbg Prod (Attorney Taylor B. Smith); jury demand (jlj)
9/5/96	7	NOTICE OF SERVICE of pre-discovery disclosure by Sanderson Plmbg Prod to Roger Reeves (jlj)
9/10/96	–	Case Management Conference set at 10:00 10/16/96 Location: Aberdeen before Magistrate Judge Jerry A. Davis (dlh)
9/17/96	–	REFUSAL TO CONSENT TO TRIAL BY MAGISTRATE JUDGE (jlj)
9/18/96	8	CONSENT by Roger Reeves to refer case to Magistrate Judge for trial (dlh)
10/18/96	9	CIVIL MINUTES for: CMC held 10/16/96; ELT 3 days; JT set 9/8/97 in Aberdeen before Mag Judge Davis; case management order entered setting deadlines; poor chance of settlement (dlh)
10/18/96	–	Case Management Conference held on 10/16/96 (dlh)
10/18/96	10	CASE MANAGEMENT PLAN AND SCHEDULING ORDER Case Assigned to CJRA Track: Standard Scheduling Deadlines: Final Pretrial Conference for 10:00 8/11/97 Aberdeen before Mag Judge Davis; Discovery cutoff 3/31/97; Joining of parties, amending of pleadings by 1/15/97; Pla. Designation of Experts by 12/31/96; Dft Designation of Experts by 1/31/97; Motion Filing deadline on 4/15/97; Case Status Report due 4/30/97. (signed by Magistrate Judge Jerry A. Davis on 10/17/96) (dlh)

10/22/96	–	NOTICE of MVD/Jury Trial set at 9:40 9/8/97 Location: Aberdeen before Chief Judge L. T. Senter Jr. (rke)
10/24/96	–	NOTICE of Final Pretrial Conference set at 10:00 8/11/97 Location: Aberdeen before Magistrate Judge Jerry A. Davis (dlh)
11/5/96	11	NOTICE OF SERVICE of first set of requests by Sanderson Plmbg Prod to Roger Reeves (dlh)
11/27/96	12	NOTICE OF SERVICE of answers to interrogatories and request for production and first set of interrogatories and request for production by Roger Reeves to Sanderson Plmbg Prod (jlj)
11/27/96	13	RESPONSE TO REQUEST FOR ADMISSIONS by Roger Reeves (jlj)
12/19/96	14	NOTICE by Sanderson Plmbg Prod to take deposition of Roger Reeves 2/25/97 Columbus (dlh)
12/27/96	15	NOTICE OF SERVICE of response to interrogatories and requests for production by Sanderson Plmbg Prod to Roger Reeves (jlj)
1/13/97	16	NOTICE OF SERVICE of second set of request for production by Roger Reeves to Sanderson Plmbg Prod (jlj)
2/5/97	17	NOTICE by Roger Reeves to take deposition of corporate representative of Sanderson Plumbing 2/25/97 Columbus (dlh)
2/6/97	–	**Terminated document [8-1] (dlh)

2/11/97	18	NOTICE OF SERVICE of response to second set of requests for production by Sanderson Plmbg Prod to Roger Reeves (jlj)
4/15/97	19	MOTION by Sanderson Plmbg Prod for Summary Judgment (jlj)
4/28/97	20	MOTION by Roger Reeves to Extend Time to file response and brief in opposition to motion for summary judgment (dlh)
4/28/97	21	ORDER granting [20-1] motion to Extend Time to file response and brief in opposition to motion for summary judgment, Response to Motion reset to 5/16/97 for [19-1] motion for Summary Judgment (signed by Chief Judge L. T. Senter Jr. on 4/28/97) Date of Entry: 4/28/97 (dlh)
5/19/97	22	RESPONSE by Roger Reeves to [19-1] motion for Summary Judgment by Sanderson Plmbg Prod (in expandable folder) (dlh)
8/11/97	23	CIVIL MINUTES for: FPTC held 8/11/97; ELT 4 days; PTO submitted at FPTC; poor chance of settlement (dlh)
8/11/97	–	Final Pretrial Conference held 8/11/97 (dlh)
8/12/97	24	PRETRIAL ORDER filed; ELT 4 days (signed by Chief Judge L. T. Senter Jr. on 8/12/97) (dlh)
8/19/97	25	ORDER denying [19-1] motion for Summary Judgment (signed by Chief Judge L. T. Senter Jr. on 8/19/97) Date of Entry: 8/19/97 (jlj)

9/8/97	26	ORDER impaneling jury (jury list attached) (mhg)
9/12/97	27	CIVIL MINUTES for: Jury Trial held 9/10-12/97 with voir dire held 9/8/97 before Chief Judge L. T. Senter, Jr. in Aberdeen: Verdict for plaintiff in sum of $35,000; oral motions of defendant for judgment as a matter of law overruled; oral motion of defendant to dismiss severance pay claim granted; Court Reporter: Jim Moody (mhg)
9/12/97	28	Exhibit list by Roger Reeves, Sanderson Plmbg Prod (witness list attached) (mhg)
9/12/97	29	INTERROGATORIES propounded to the jury finding for the plaintiff in sum of $35,000 and that discrimination was willful (mhg)
9/12/97	30	Jury Note filed (mhg)
9/12/97	31	RESPONSE of court to [30-1] notes jury (mhg)
9/12/97	32	Jury instructions given (mhg)
9/12/97	33	Jury instructions refused (mhg)
9/12/97	–	Jury Trial held 9/10-12/97 (mhg) [Entry date 09/15/97]
9/18/97	34	MOTION by Roger Reeves to Hold in Abeyance attorneys fees pending appeal (jlj)
9/18/97	35	JUDGMENT for Roger Reeves in the sum of $70,000, 5.58 percent and costs against Sanderson Plmbg Prod (on 9/18/97) COB #50 pg. 19 Date of Entry: 9/18/97 (mhg)
9/18/97	–	Case closed (mhg)

9/19/97	36	MOTION by Sanderson Plmbg Prod for Judgment as a Matter of Law or in the alternative, for a new trial, and for stay of execution of judgment (jlj)
9/19/97	37	ORDER granting [34-1] motion to Hold in Abeyance attorneys fees pending appeal; motion shall be filed 14 days after appeal mandate (signed by Chief Judge L. T. Senter Jr. on 9/19/97) Date of Entry: 9/19/97 (mhg)
9/26/97	38	MOTION by Roger Reeves for front pay (jlj)
10/10/97	39	RESPONSE by Sanderson Plmbg Prod to [38-1] motion for front pay by Roger Reeves (jlj)
5/21/98	40	MEMORANDUM OPINION (signed by Chief Judge L. T. Senter Jr. on 5/21/98) (dlh)
5/21/98	41	ORDER granting [38-1] motion for front pay, denying [36-1] motion for Judgment as a Matter of Law or in the alternative, for a new trial, and for stay of execution of judgment; the plaintiff recover of the defendant front pay in the amount of $28,490.80 (signed by Chief Judge L. T. Senter Jr. on 5/21/98) COB #50 pg. 131 Date of Entry: 5/21/98 (dlh)
5/28/98	42	NOTICE OF APPEAL of [41-1] order by Sanderson Plmbg Prod FILING FEE $105.00 RECEIPT #51067 Appeal record due on 6/27/98 (dlh)
5/28/98	–	Notice of Appeal and certified copy of docket to USCA: [42-1] appeal by Sanderson Plmbg Prod (dlh)

6/3/98	–	Transcript requested [42-1] appeal by Sanderson Plmbg Prod Transcript due 7/3/98 (dlh)
6/23/98	–	TRIAL TRANSCRIPT filed for dates of 9/8-12/97 (2 volumes) (jlj)
6/23/98	–	NOTICE of Docketing ROA from USCA Re: [42-1] appeal by Sanderson Plmbg Prod USCA Number: 98-60334 (jlj)
6/24/98	–	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [42-1] appeal by Sanderson Plmbg Prod (jlj)
10/19/98	–	Certified and transmitted reconstructed Record on Appeal to U.S. Court of Appeals: [42-1] appeal by Sanderson Plmbg Prod (dlh) [Entry date 10/15/98] [Edit date 10/19/98]
6/18/99	43	JUDGMENT OF USCA (certified copy) Re: [42-1] appeal by Sanderson Plmbg Prod reversing decision of the District Court and rendering judgment in favor of Sanderson; each party to bear own costs; issued as mandate 6/17/99 (mhg) [Entry date 06/21/99] [Edit date 06/22/99]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROGER REEVES,

Plaintiff,

v. No.1:96CV197-S-D

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant.

ORDER DENYING SUMMARY JUDGMENT

This cause is before the court upon defendant's motion for summary judgment. The plaintiff has alleged that Sanderson Plumbing violated the Age Discrimination in Employment Act by terminating his employment. Having fully reviewed the record before the court and considering the argument of counsel as well as the applicable case law, this court finds that there is a genuine issue of material fact and that defendant is not entitled to judgment as a matter of law.

Therefore, IT IS ORDERED:

That defendant's motion for summary judgment is denied.

SO ORDERED, this the 19th day of August, 1997.

/s/ L.T. Senter, Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROGER REEVES,

Plaintiff,

v. No.1:96CV197-S-D

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant.

ORDER DENYING JUDGMENT NOTWITHSTANDING THE VERDICT AND GRANTING FRONT PAY

In accordance with a memorandum opinion issued concurrently,

IT IS ORDERED:

That the defendant's motion for judgment notwithstanding the verdict be denied;

That the plaintiff's motion for front pay be granted; and

That plaintiff recover of the defendant front pay in the amount of $28,490.80.

SO ORDERED.

This the 21st day of May, 1998.

/s/ L.T. Senter, Jr.
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60334

ROGER REEVES,

Plaintiff-Appellee,

versus

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(96-CV-197)

(Filed Apr. 22, 1999)

Before HIGGINBOTHAM, JONES and WIENER, Circuit Judges.

Per Curiam:*

In this age discrimination case, Defendant-Appellant Sanderson Plumbing Products, Inc. ("Sanderson") appeals the district court's order denying Sanderson's post-verdict motion for judgment as a matter of law

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

("JML"), and granting Plaintiff-Appellee Roger Reeves's motion for front pay. After reviewing the record, we conclude that Reeves did not prove a violation of the Age Discrimination in Employment Act ("ADEA") by a preponderance of the evidence. Hence, we reverse the district court's order and render judgment in favor of Sanderson.

I

FACTS AND PROCEEDINGS

Fifty-seven year old Reeves was employed for 40 years by Sanderson – a company involved in the manufacture of toilet seats and covers. At the time of his discharge, Reeves worked in a department of the company known as the Hinge Room. The Hinge Room ran a regular line which was supervised by Reeves, and a special line which was supervised by 35 year old Joe Oswalt. Forty-five year old Russell Caldwell was the manager of the department and he supervised both Reeves and Oswalt.

At all times relevant to this case, a union represented Sanderson's production and maintenance employees. The union contract included general work rules, part of which dealt specifically with attendance. Pursuant to these rules, an employee who was absent from work in excess of five percent of his scheduled hours in a month, or who was late twice in a month, was subject to disciplinary action.

As part of his essential duties as a supervisor, Reeves was required to keep daily, weekly, and monthly records of the attendance and tardiness of employees under his control. These records were reviewed by Reeves for accuracy before he passed them on to Caldwell, who then sent them on to data processing.

In the fall of 1993, Sanderson's Department of Quality Control – under the direction of Powe Chesnut – conducted a review of the operating procedures in the Hinge Room. According to Sanderson, the study revealed productivity problems on Reeves's regular line, stemming from a lax assembly line operation. As a result, Reeves was placed on a 90-day probation for unsatisfactory work performance.

Nearly three years later, in the summer of 1995, Caldwell informed Chesnut – who by this time had become Director of Manufacturing – that the Hinge Room was again having difficulty meeting its production requirements due to pervasive absenteeism and tardiness. Because the Hinge Room records did not reflect employee attendance problems, however, Chesnut requested that Lucille Reeves, then-Manager of Quality Control, conduct an audit of the department's time sheets. This investigation revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt. Dana Jester, Vice President of Human Resources, conducted an independent review of the records, and confirmed Quality Control's findings. Armed with these results, Chesnut, Jester, and Vice President of Operations Tom Whitaker, recommended to Company President

Sandra Sanderson[1] that Caldwell and Reeves be dismissed.[2] Ms. Sanderson – who was 52 years old at the time – heeded this advice, firing both Caldwell and Reeves in October 1995. Thereafter, Sanderson filled Reeves's position, on three successive occasions, with men in their thirties.

In June 1996, Reeves filed suit, claiming that Sanderson terminated him because of his age, in violation of the ADEA. Reeves based his claim on two age-related statements allegedly made by Chesnut several months before Reeves's dismissal, namely (1) that Reeves was so old that he "must have come over on the Mayflower," and (2) that he was "too damn old to do the job."

At the conclusion of the trial, the jury returned a verdict in favor of Reeves, awarding him $35,000 and finding that Sanderson discriminated willfully on the basis of age in its adverse employment action. After the verdict, Sanderson renewed its previous motion for JML, and moved, in the alternative, for a new trial. At the same time, Reeves filed a motion seeking front pay. The district court denied Sanderson's motions, and entered judgment in favor of Reeves in the amount of $70,000 – adding $35,000 in liquidated damages to the jury's compensatory

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[1] The record is uncontradicted that Ms. Sanderson had married Chesnut in December 1988.

[2] Chesnut testified at trial that, had Oswalt not voluntarily terminated his employment several months earlier, Oswalt would have been subject to dismissal along with his co-workers, Reeves and Caldwell.

damages in that amount based on the jury's determination of willfulness.[3] In addition, the court awarded Reeves $28,490.80 in front pay, representing two years of lost income. Sanderson timely filed a notice of appeal.

II

ANALYSIS

A. Standard of Review

"A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict."[4] We review the denial of such motions *de novo*, applying the same standard as the district court.[5] A JML is appropriate if the "facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded" as the jury did.[6] Applying this standard to the instant case, the district court's judgment should be reversed only if "there is no legally sufficient evidentiary basis for a reasonable jury to find" that Sanderson discharged Reeves because of his age.[7]

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[3] *See* 29 U.S.C. § 626(b) (1990) (providing that "liquidated damages shall be payable only in cases of willful violations of this Act.").

[4] *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997).

[5] *Nichols v. Lewis Grocer*, 138 F.3d 563, 565 (5th Cir. 1998).

[6] *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 148 (5th Cir. 1995).

[7] FED. R. CIV. PROC. 50(a)(1).

B. The ADEA

The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age."[8] To establish a violation of the ADEA, a plaintiff must prove, by a preponderance of the evidence, intentional discrimination on the part of his employer.[9] As direct evidence of discrimination is rare, plaintiffs may rely on indirect evidence and reasonable inferences to establish an ADEA claim under the *McDonnell Douglas* burden-shifting analysis.[10]

Under this analysis, a plaintiff must first present a prima facie case, thereby establishing a rebuttable presumption of age discrimination.[11] If the plaintiff meets this burden, the employer must then rebut the presumption by articulating a legitimate, nondiscriminatory reason for the challenged employment action.[12] If the employer presents such evidence, then the presumption of discrimination fades, and the plaintiff must prove that

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[8] 29 U.S.C. § 623(a)(1) (1990).

[9] *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997).

[10] *Id.*

[11] *Id.* There are four elements to a prima facie case of discriminatory discharge under the ADEA, including proof that the plaintiff was (1) discharged; (2) qualified for the position; (3) within the protected class at the time of the discharge; and (4) either i) replaced by someone outside the protected class, ii) replaced by someone in the protected class but younger than the plaintiff, or iii) otherwise discharged because of his age. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993).

[12] *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir. 1996).

the employer's articulated reason is a pretext for unlawful discrimination.[13]

To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decision-making process.[14] Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to that employment decision.[15] Mere "stray remarks" – i.e., comments which are "vague and remote in time" – however, are insufficient to establish discrimination.[16]

1. Sufficiency of the Evidence

On appeal, Sanderson does not challenge the sufficiency of the evidence supporting Reeves's prima facie case of age discrimination.[17] Rather, Sanderson argues

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[13] *Price*, 119 F.3d at 337.

[14] *Id.*

[15] *Brown*, 82 F.3d at 655.

[16] *Id.*; *Price*, 119 F.3d at 337.

[17] Indeed, when, as here, a case has already been tried on the merits, whether the plaintiff properly made out a prima facie case is no longer relevant. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). Instead, the important inquiry is whether the plaintiff has "produced sufficient evidence for a jury to find that discrimination has occurred." *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 123 (5th Cir. 1992).

that it articulated a legitimate, nondiscriminatory explanation for firing Reeves: Reeves's shoddy record keeping. Because Reeves failed to offer evidence sufficient to prove *both* that this reason is untrue *and* that age is what really triggered Reeves's discharge, argues Sanderson, it is entitled to judgment as a matter of law. We agree.

At trial, Chesnut testified that he became aware of timekeeping problems in the Hinge Room after Caldwell – the department manager – complained of inadequate production resulting from absenteeism. This complaint prompted an investigation which uncovered numerous errors in the department's attendance records. Because of specific misrepresentations and errors made by Reeves, argues Sanderson, employees under Reeves's control were being paid for time they did not work, and were not being disciplined for their habitual absenteeism and tardiness. Reeves testified that he was familiar with the company's attendance policy, as well as his timekeeping responsibilities as a supervisor under that policy. In light of this admission, argues Sanderson, Reeves's failure to keep accurate records in accordance with the policy amounts to unsatisfactory work performance, which is a legitimate, nondiscriminatory basis for dismissal.

Reeves attempts to cast suspicion on Sanderson's proffered explanation by first asserting that Sanderson's explanation changed between the time of Reeves's discharge and trial. When he was fired, claims Reeves, he was told that he had caused a *specific* employee to be paid for time she had not actually worked. In contrast, Reeves argues, Sanderson defended its employment decision at trial by claiming that Reeves's timekeeping mistakes had resulted in the overpayment of *numerous* employees.

Although proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a "red flag" of pretext,[18] the inconsistency noted by Reeves in this case can hardly be considered mendacious. Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves's work performance was unsatisfactory. That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie.

Reeves goes on, however, to challenge the veracity of Sanderson's allegation that he engaged in inaccurate record keeping at all. At trial, Reeves testified that he was always very careful to ensure that his employees arrived at their work stations on time. In addition, he claimed that any employee who was permitted to clock in early or stay late – and thereby receive additional pay – had extra work assignments to perform. According to Reeves, if any record keeping errors were made, they were the result of Caldwell's inattentiveness and not his own. Moreover, Reeves points out, at trial Chesnut was unable to testify as to the cost to the company, if any, of Reeves's alleged record falsifications. Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual.

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[18] *Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996).

On this point, Reeves very well may be correct. Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

In an attempt to satisfy this burden at trial, Reeves testified that Chesnut – while serving as Director of Manufacturing – made the above-quoted age-related comments just months before Reeves was terminated. As Chesnut was one of three people who recommended his termination to Ms. Sanderson, argues Reeves, Chesnut's comments should be taken as sound evidence of the company's underlying discriminatory motives.

Reeves also expressed the belief that he was treated less favorably than Sanderson's younger employees. This belief, Reeves now claims, is confirmed by Oswalt's testimony that Chesnut treated Reeves like a child. As further evidence of Sanderson's disparate treatment, Reeves points to his 1993 probation, and notes that the 30-something Oswalt was not put on probation despite a similarly lagging production level on the Hinge Room's special line. Likewise, argues Reeves, when Quality Control initiated its investigation of his timekeeping records in 1995, none of the supervisors from other departments were singled out for such scrutiny.

Considering all of the evidence in a light most favorable to Reeves, we nevertheless conclude that there was insufficient evidence for a jury to find that Sanderson

discharged Reeves because of his age. Despite the potentially damning nature of Chesnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination. In addition, Chesnut was just one of three individuals who recommended to Ms. Sanderson that Reeves be terminated, and there is no evidence to suggest that any of the other decision makers were motivated by age. In fact, the record shows that at least two of the decision makers were themselves over the age of 50 – Ms. Sanderson at 52, and Jester at 56. Furthermore, the fact remains that, as a result of the 1995 investigation, each of the three Hinge Room supervisors was accused of inaccurate record keeping, including not only Reeves and Caldwell, but 35 year old Oswalt as well. Finally, there is evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's.

Based on our plenary review, we find that Reeves did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA. For this reason, we reverse and render judgment in favor of Sanderson.

REVERSED AND RENDERED.

DEFENDANT'S
EXHIBIT
D-5

HINGEROOM ABSENTEEISM
REGULAR LINE

	Date	Code
Melvin Brownlee	7/11/95	01
	7/12/95	01
	7/17/95	02
	8/29/95	02
	9/08/95	01
	9/11/95	01
	9/12/95	01
	9/25/95	01

REMARKS: He should have received a "Write-up" for July & September.

Diane Henderson	7/19/95	02
	8/09/95	02
	8/10/95	01
	8/23/95	01
	9/05/95	01
	9/06/95	01
	9/19/95	01

REMARKS: She should have received a "Write-up" for July & September.

Diane Lanier	8/10/95	01
	9/19/95	01
	9/20/95	01
	9/27/95	01

REMARKS: Received 1.25 overtime hours w/e 7/16/95 – received .33 hours w/e 7/17/95.
She should have received a "Write-up" for September.

D.C. Mitchell	7/14/95	01
	7/18/95	01
	7/24/95	01
	7/25/95	01
	7/28/95	01
	7/31/95	01
	8/01/95	01
	8/02/95	01
	8/07/95	01
	8/08/95	01
	8/09/95	01
	8/14/95	01
	8/15/95	01
	8/21/95	01
	8/25/95	01
	8/28/95	01
	8/29/95	01
	9/05/95	01
	9/08/95	01
	9/14/95	01
	9/18/95	01
	9/19/95	01
	9/20/95	05
	9/25/95	01
	9/28/95	01

REMARKS: He should have received a "Write-up" for July, August, and September.

Marcella Hogan	7/21/95	02 – line didn't run
	7/28/95	08 – line did run
	9/21/95	02 – no punch

REMARKS: Received .70 overtime w/e 7/16/95 – 1.09 overtime 7/23/95 – 1.35 overtime 7/30/95 – 2 hours overtime 9/3/95 1.10 overtime 9/10/95 – 1 hour overtime 9/17/95 – 2 hours overtime 10/1/95 – 1.47 overtime 9/24/95 – 1.75 overtime 8/6/95 – 1.5 straight time 8/20/95 – 1.75 overtime 8/13/95 – 2 hours overtime 8/27/95
He should have received a "Write-up" for July.

Frederick Brownlee	7/11/95	01
	7/17/95	01
	9/13/95	05
	9/18/95	01
	9/21/95	01
	9/25/95	01

REMARKS: He should have received a "Write-up" for September.

Sandra Edwards	7/26/95	01
	7/28/95	02
	8/22/95	05
	9/17/95	02
	9/22/95	01
	9/25/95	05
	9/07/95	05

REMARKS: She should have received a "Write-up" for July.

Eric Harris	7/20/95	09 – No punch
	8/21/95	01
	9/01/95	01
	9/14/95	01

Lee Garner	7/26/95	05
	8/02/95	01
	8/09/95	01
	8/10/95	01
	8/11/95	01
	8/14/95	01
	8/15/95	01
	8/29/95	02
	8/30/95	05
	9/11/95	01

REMARKS: He should have received a "Write-up" for August.

Tommie C. Williams	8/07/95	01
	8/09/95	01
	8/28/95	05
	9/12/95	01
	9/18/95	01
	9/27/95	01

REMARKS: He should have received a "Write-up" for September.

HINGEROOM ABSENTEEISM
SPECIAL LINE

Sheila Tuggle (Jefferson)	7/21/95	01
	7/25/95	01
	8/04/95	01
	8/14/95	05
	9/08/95	05 x 02
	9/11/95	05 x 08
	9/28/95	01
	9/20/95	01
	9/22/95	01

REMARKS: She should have received a "Write-up" for September. 7/14/95 paid 1/2 hour straight through lunch

James Bardley	7/18/95	01
	7/15/95	05
	8/08/95	05
	8/09/95	01
	8/10/95	01
	9/06/95	05 – 04

REMARKS: He should have received a "Write-up" for July.

Shirley Bradford	7/12/95	01
	7/13/95	01
	7/14/95	01
	7/17/95	01
	7/15/95	05
	8/09/95	01
	8/10/95	02
	9/07/95	05
	9/11/95	09
	9/28/95	01

REMARKS: .11 overtime hours 7/23/95 – .28 overtime hours 7/3/95
She should have received a "Write-up" for July.

Darla Pippins	7/10/95	01
	7/11/95	01
	7/13/95	01
	7/14/95	01
	7/15/95	01
	7/18/95	01
	7/19/95	01
	7/20/95	05
	7/21/95	01
	7/24/95	01
	7/25/95	01
	8/01/95	01
	8/02/95	05
	8/03/95	01

	8/09/95	01
	8/14/95	05
	8/17/95	01
	8/18/95	01
	8/22/95	01
	9/01/95	01
	9/07/95	05
	9/19/95	05
	9/20/95	01
	9/21/95	01
	9/22/95	01
	9/25/95	01
	9/26/95	01

REMARKS: If she was not late, then she was paid straight through which accumulated into overtime. If not, she should have received a "Write-up" for July, August, and September.

Jackie Sanders	7/10/95	01	
	7/14/95	05	
	7/15/95	01	
	7/19/95	01	
	7/21/95	05	– but punched in and out
	7/25/95	01	
	7/27/95	05	
	8/03/95	01	
	8/11/95	01	
	8/15/95	02	
	8/23/95	02	
	9/15/95	08	– time sheet paid her for a half day but absentee report showed 8 hours

	9/19/95	05
	9/21/95	01
	9/26/95	05

REMARKS: She should have received a "Write-up" for July and September.

Edna Ussery	7/15/95	05
	8/29/95	01
	8/31/95	01
	9/19/95	05

REMARKS: She should have received a "Write-up" for July.

Tawanda Deloach (Brooks)	7/20/95	01
	9/11/95	05
	9/27/95	02

REMARKS: She should have received a "Write-up" for September.

Mattie Williams	8/21/95	05
	9/05/95	05
	9/06/95	05
	9/07/95	05
	9/20/95	05
	9/28/95	05

REMARKS: These dates were not coded and she should have received a "Write-up" for September.

Norma Henderson	7/25/95	01	
	8/04/95	01	
	8/11/95	05	– paid straight through lunch docked 1 hour instead 1 ½ hours
	8/14/95	05	
	8/18/95	01	
	8/23/95	01	

	8/24/95	01
	9/05/95	01
	9/12/95	09
	9/20/95	01
	9/21/95	09
	9/25/95	09

REMARKS: She should have received a "Write-up" for August.

Leon King	8/22/95	01
	9/13/95	01
	9/14/95	05
	9/15/95	05
	9/18/95	01
	9/19/95	01
	9/21/95	05 – 08
	9/25/95	01 – 09
	9/26/95	01
	9/27/95	01

REMARKS: Received – 1.5 overtime 8/21/95 – .5 overtime hours 8/25/95.
.50 overtime hours 9/5/95
He should have received a "Write-up" in September.

HINGEROOM ABSENTEEISM
VIEW PACK LINE

Brenda Hamilton	7/10/95	08 – no punch
	8/02/95	01
	8/03/95	01
	8/09/95	01
	8/11/95	01
	8/16/95	01
	8/21/95	05
	9/28/95	05 – 02

REMARKS: She should have received a "Write-up" for August.

Billy Isaac	9/29/95	05 – 02

REMARKS: .25 overtime hours 9/27/95 – He is a "new Hire" – and should have been terminated.

HINGEROOM ABSENTEEISM
REGULAR LINE

Genie Coley	9/05/95	08
	9/07/95	08
	9/11/95	02
	9/12/95	02

Received 1.38 overtime w/e 7/16/95 – 1.85 hours overtime w/e 7/30/95 1.25 overtime w/e 8/6/95 – .25 overtime 8/13/95 – 1.25 hours overtime 8/20/95 – 1 hour overtime 8/27/95 – 1.25 hours overtime 9/3/95 1 hour overtime 9/24/95 – 1.5 hours overtime 10/1/95

REMARKS: W/E 9/17/95 absentee report showed 8 hours – 02 (9/11/95) and 8 hours – 02 (9/12/95) but the week ending time sheet showed her written in for 8½ hours 9/11/95 and 9/12/95 – received 2½ hours overtime. She should have received a "Write-up" in September.

DEFENDANT'S EXHIBIT D-5 A

SUMMARY OF VIOLATIONS
COMMITTED BY ROGER REEVES

Name	
Melvin Brownlee	On July 11 and 12, 1995, was late reporting to work and should have been coded 01 by Mr. Reeves. However, Mr. Brownlee was not coded as being late on either day. Mr. Brownlee was also absent on July 17. Additionally, on September 8, 11, 12, and 25 of 1995, Mr. Brownlee was late but not coded as such by Mr. Reeves. Because of his tardiness on these occasions, he should have received a reprimand issuance for both the months of July and September, but because of this failure on the part of Mr. Reeves and/or condoned by Mr. Caldwell, no such report was made, and Mr. Brownlee was not issued any disciplinary action for those months.
Diane Henderson	Mrs. Henderson was tardy on August 10, 1995, but was not coded as such by Mr. Reeves. Likewise, she was tardy on August 23, 1995, but was not coded as such by Mr. Reeves. Mrs. Henderson was tardy on September 5, 6, and 19, but was not coded as such by Mr. Reeves and as a result though under the policy she should have

	received a disciplinary action in September. She did not.
Diane Lanier	This employee was allowed to clock in prior to 6:50 on July 11, 13, and 14, which is a violation of company policy, and thus was paid hours for time when she did not work. This resulted in her being credited with 1.25 overtime hours for the week ending July 16, which she should not have received. It is the responsibility of the immediate supervisor not to allow employees to clock in before 6:50 because under the clock system, employees who clock in at 6:50 are expected to be at work at 7:00 and are paid from 7:00 o'clock on, whereas if employees do clock in prior to 6:50, their time shows from the time they clock in until 7:00 and it is the responsibility of the immediate supervisor to make this correction on the daily time sheet as aforementioned. Additionally with respect to Ms. Lanier, on August 10, 1995, she was tardy but the same was not coded by Mr. Reeves. Additionally, Ms. Lanier was tardy on September 19, 20, and 27, 1995, and should have received disciplinary write-up but because of failure of the Plaintiff and his supervisor to follow through in

this regard, there was no such disciplinary write-up.

D. C. Mitchell

Because of tardiness of this employee on July 14, 18, 24, 25, 28, and 31, 1995, this employee should have been issued a disciplinary warning in July. However, Plaintiff failed to code his tardiness and thus, no write-up occurred; additionally, this employee was tardy on August 1, 2, 7, 8, 9, 14, 15, 21, 25, 28, and 29, 1995, and should have been issued a disciplinary warning but because of failure on the part of the Plaintiff to code such on the aforementioned records, no disciplinary action was issued. Additionally, on September 5, 8, 14, 18, and 19, this employee was tardy but was not coded as such, and on September 20, this employee left early, but was coded as being sent home early (which would not have constituted a violation of the attendance policy), which was not correct in that this employee violated the attendance policy by leaving prior to the end of the shift. This employee should have received disciplinary action for July, August, and September (assuming he had no action prior to July, the September should have mandated suspension), but because of failure on the part of the Plaintiff to properly code, no

write-up or disciplinary action issued to this employee.

Marcella Hogan

Because of Plaintiff allowing this employee to clock in prior to the required time and not coding and reflecting his time card to show pay from 7:00 a.m. rather than prior thereto, this employee was paid overtime (when he should not have been) for the following weeks:

0.70 hour overtime for the week ending July 16, 1995; 1.09 hours overtime for the week ending July 23, 1995; 1.35 hours overtime for the week ending July 30, 1995; 2.00 hours overtime for the week ending September 3, 1995; 1.10 hours overtime for the week ending September 10, 1995; 1.00 hour overtime for the week ending September 17, 1995; 2.00 hours overtime for the week ending October 1, 1995; 1.47 hours overtime for the week ending September 24, 1995; 1.75 hours overtime for the week ending August 6, 1995; 1.5 hours straight time for the week ending August 20, 1995; 1.75 overtime for the week ending August 13, 1995; and 2.00 hours overtime for the week ending August 27, 1995.

Additionally, in the case of this employee, the line did not operate on July 21, yet Plaintiff made an

	error in the daily or weekly time sheets by coding this employee as being out that day which reflected on his attendance policy, and additionally on July 28, when the line ran, this employee did not report for work, but was coded by the Plaintiff erroneously to have been sent home early — which was not the case in that the line worked. Accordingly, there were two errors made here. Because of the hours worked by the company during July and because of these errors, this employee did not receive any disciplinary action for July, which should have been handed down.
Frederick Brownlee	This employee was tardy on July 17, 1995, but no coding was made of the tardiness of this employee by Mr. Reeves. Additionally, on September 13, this employee left early but no coding was made of such. On September 18, 21, and 25, the employee was tardy. This employee should have received a write-up for September but because of failure of the Plaintiff to code the aforementioned tardies, no disciplinary action was issued.
Sandra Edwards	This employee should have received disciplinary action in July for tardiness but did not receive such because Plaintiff and his

	supervisor failed to issue such disciplinary action.
Lee Garner	This employee was absent and/or tardy on August 2, 9, 10, 11, 14, 15, 29, and 30, 1995, but only coded to have been out two hours on August 29 and out two hours on personal business on August 30, and accordingly, because of this failure on the part of Plaintiff, this employee was not issued disciplinary action as he should have been for the month of August.
Tommie C. Williams	This employee was tardy on August 7, 1995, but was not coded as such by Plaintiff. Additionally, on September 12, 18, and 27, 1995, he was tardy but there was no coding of such by Plaintiff. According to the attendance policy and the tardiness record, this employee should have received disciplinary action in September of 1995, but did not because of the failure on the part of the Plaintiff to code.
Brenda Hamilton	This employee was tardy and/or absent on August 2, 3, 9, 11, 16, and 21, 1995. Plaintiff only coded absence and/or tardiness for August 16, 21, 24, and 25, and according to the employee's actual attendance, she should have received disciplinary action for August, but did not due to the

failure of Plaintiff to code the same.

Billy Isaac — This employee was a probationary employee in September of 1995. This employee was absent on September 29, but no coding or documentation was made of the same by Plaintiff. Inasmuch as this employee was a probationary and/or "new hire", he should have been terminated.

Genie Coley — This employee was not scheduled to be paid and to report for work until 7:00 a.m. However, because Plaintiff allowed this employee to clock in prior to schedule and not code the necessary changes to show pay only from 7:00 a.m., she received pay for time when she was not supposed to as follows: 1.38 hours overtime for the week ending July 16, 1995; 1.85 hours overtime for the week ending July 30, 1995; 1.25 hours overtime for the week ending August 6, 1995; .25 hours overtime for the week ending August 13, 1995; 1.25 hours overtime for the week ending August 20, 1995; 1.00 hours overtime for the week ending August 27, 1995; 1.25 hours overtime for the week ending September 3, 1995; 1.00 hour overtime for the week ending September 24, 1995; and 1.50 hours overtime for the week ending October 1, 1995.

Additionally, on the daily time records, this employee was shown as being absent on September 11 and 12, but on the weekly time records, Plaintiff made a notation that the employee worked a full eight hours on these days and should be paid accordingly. Based on this improper change in coding on the weekly time record, the employee was erroneously paid.

Jan 7 2000

(3)

No. 99-536

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

JIM WAIDE
(Counsel of Record)
David A. Chandler
Victor I. Fleitas
Waide, Chandler & Fleitas, P.A.
P.O. Box 1357
Tupelo, MS 38802
(662) 842-7324

Eric Schnapper
University of Washington
School of Law
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167

Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

January 7, 2000

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QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

2. In determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 50, should a district judge weigh all of the evidence or consider only the evidence favoring the nonmoving party?

3. Is the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56 the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50?

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THE COURT OF APPEALS ERRED IN EXAMINING ALL OF THE EVIDENCE TO DETERMINE WHETHER JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED. THE COURT SHOULD HAVE USED THE SAME STANDARDS USED IN CONSIDERING A SUMMARY JUDGMENT MOTION.
HOWEVER, UNLIKE REVIEW OF A DENIAL OF A RULE 56 MOTION, AN APPEALS COURT SHOULD GRANT DEFERENTIAL REVIEW TO A DECISION OF A TRIAL JUDGE TO DENY A RULE 50 MOTION. 33

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OPINIONS BELOW

The opinion of the Court of Appeals, which is not reported, is set out at pp. 1a-10a of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The order of the District Court denying Respondent's motion for judgment as a matter of law, which is not reported, is at Joint Appendix ("J.A.") 9.

JURISDICTION

The decision of the Court of Appeals was entered on April 22, 1999. A timely petition for rehearing and suggestion for rehearing en banc were denied on June 18, 1999. The Petition for Writ of Certiorari was filed on September 15, 1999. This Court granted certiorari on November 8, 1999. Jurisdiction of this Court exists under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer ... to discharge an individual ... because of such individual's age ...."

The Seventh Amendment to the United States Constitution provides "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Federal Rule of Civil Procedure 50 provides, in pertinent part:

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue ...

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial**. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59...

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Petitioner, Roger Reeves, brought this age discrimination suit against Respondent, Sanderson Plumbing Products, Inc., which fired Mr. Reeves when he was fifty-seven years old and had worked forty years for Defendant and its predecessors. Record ("R.") 1-3. After the parties had full discovery, the district court denied Defendant's summary judgment motion

and set the case for trial by jury. R. 221. The parties held a four day trial in which the jury heard Mr. Reeves' evidence that Defendant's decision-maker was biased because of Mr. Reeves' age, Defendant's evidence that it had discharged Mr. Reeves and another employee (Caldwell) because they failed to discipline employees, and Mr. Reeves' response that his disciplinary record was proper and, hence, could not explain his termination. During the trial, the district court twice denied Defendant's directed verdict motion and submitted the case to the jury. The jury returned a verdict for Mr. Reeves, finding that Defendant had engaged in willful age discrimination against Mr. Reeves. Post-trial, the district court denied Defendant's renewed directed verdict motion.

After reviewing the evidence *de novo*, the Fifth Circuit reversed, concluding that "there was insufficient evidence for a jury to find that Defendant discharged Mr. Reeves because of his age," vacated the jury verdict, and entered judgment as a matter of law for Defendant. What follows is a summary of the evidence offered by the parties at trial on which the jury based its determination that Mr. Reeves had satisfied his burden that Defendant had willfully discharged him because of his age, which the Fifth Circuit set aside.

B. MR. REEVES' EVIDENCE OF AGE DISCRIMINATION

Mr. Reeves began work for a corporate predecessor of Defendant when he was eighteen years old in 1955. Transcript ("Tr.") 2, 3. In 1979, Mr. Reeves was promoted to supervisor in the "hinge department." Tr. 4, 32. The hinge room had both a regular line supervised by Mr. Reeves, and a "special line" supervised by Joe Oswalt. Tr. 32-33. The thirty-five-year-old Oswalt and the fifty-seven-year-old Mr. Reeves were both supervised by the hinge room manager, forty-five-year-old Joe Caldwell. Tr. 3, 32-33.

The Defendant manufactures toilet seats and toilet products. Tr. at 147. Ninety-eight percent of its stock is owned by company President Sandra Sanderson, widow of the previous owner of the company. Tr. at 9.

In 1988, Mrs. Sanderson married Powe Chesnut. Tr. at 90, 93. Joe Oswalt, who worked for Defendant through July 1995, and Mr. Reeves both testified that Powe Chesnut, age forty-seven, was the "absolute power" in control of the company. Tr. 3, 4, 80-81.

Oswalt testified that his treatment from Chesnut was "nothing" compared to Chesnut's treatment of Reeves. Tr. 82-83. Oswalt was allowed to "defy Chesnut," but Chesnut always watched Mr. Reeves, or had another employee, such as Lucille Reeves, watching him. Tr. 83. Mr. Reeves testified that Chesnut's interaction with him consisted of "cussing him out" and shaking his finger in his face. Tr. 26.

The jury heard evidence that Chesnut's harsh treatment of Mr. Reeves was age-based. Chesnut told Mr. Reeves that he was "so old that he must have come over on the Mayflower." About two months before Mr. Reeves was fired, Chesnut told him, when he was trying to get a machine running, that he was "too damn old to do the job." Tr. 26, 50.

On October 23, 1995, Chesnut instructed Mr. Reeves to follow him to the main office, where two other company officials [Personnel Manager Jester and Vice-President Whitaker] were present. Chesnut brought out the time card of an hourly employee [Genie Mae Coley] and said "You paid her for two days when she wasn't there." Tr. 23. Personnel Manager Jester then told Mr. Reeves he was fired "for making a mistake on [Coley's] time card." Tr. 23. Mr. Reeves then explained that he had not been at work on the days when Coley

was not there, Tr. 23, because he had been hospitalized during this time. Tr. 17. When he came back to work from his illness, he found a note written by Hinge Room Manager Caldwell directing that Coley, who was herself hospitalized on the two days in question, Tr. 249-250, be given credit for the two days' work. Tr. 17, 20. Indifferent to the fact Mr. Reeves' boss [Caldwell] had directed that Coley be paid, Chesnut walked Mr. Reeves out of the plant, terminating his forty years of employment. Tr. 17, 20-22, 25.

By the time of the trial, Defendant had used three different replacements for Mr. Reeves. All were in their thirties. Tr. 101-102. Mrs. Sanderson testified that there would be a "learning curve" in replacing Reeves with these younger persons. Tr. at 104. Chesnut also conceded that "because of the training time" which the new, younger employees required, efficiency would be harmed. Tr. 224-225. Joe Oswalt testified that it took him a learning period of three years to match Mr. Reeves' efficiency. Tr. 79.

At the close of Mr. Reeves' evidence, and following extensive argument, the District Judge denied Defendant's Motion for Judgment as a Matter of Law. Tr. 167-183.

C. SANDERSON PLUMBING'S ARTICULATION OF REASONS FOR DISCHARGE DECISION

Through tedious, detailed evidence of alleged occurrences at the workplace, Defendant tried to show that Mr. Reeves was fired because an investigation revealed a failure to discipline certain subordinates. Also, Defendant claimed that, since it also fired Joe Caldwell (age forty-five), the firing of Reeves was not based on his age. Tr. 152-155, 209-220, 314-315.

Powe Chesnut testified that Hinge Room Manager Caldwell told him that the hinge department employees were "leaving early," that there was an "absentee problem," and that the units per man hour were down. Tr. 203. Accordingly, Chesnut directed Lucille Reeves[1] to investigate the hinge room. Tr. 203-204. This investigation was for the months of July, August and September, 1995. Tr. 203-205.

The Defendant introduced both a summary of the investigation and a layman's explanation of the investigation, which was prepared at Defendant's counsel's office. Tr. 205-206, 277-278. J.A. 21, 29 (Exhibits D-5, D-5A).[2] The documents state that Mr. Reeves, Oswalt, and the unnamed superior who replaced Oswalt after he left in July 1995 (all of whom worked under Caldwell), were guilty of inadequate disciplinary practices.

The asserted error that was the subject of most of the trial testimony was Reeves' alleged failure to assign a tardy code ["01"] to employees who clocked in at 7:00 a.m. Tr. 119, 128, 140, 141, 205-206, 241, 245-247, 262, 319. The Defendant claimed that if an employee clocks in at 7:00 a.m., he was "tardy," since this would mean that he could not have been at his work station by 7:00 a.m. when the shift began. Tr. 245-

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[1] This is the same Lucille Reeves, no relation to Mr. Reeves, who had been watching Mr. Reeves at Chesnut's direction. Tr. 83.

[2] Exhibits D-5 and D-5A are only the employer's conclusions that errors were made. The only records Mr. Reeves prepared consisted of corrections to daily and weekly time records, plus his handwritten notes. Tr. 20. These documents were not offered into evidence by Defendant.

247, 249-250.

On cross-examination, Chesnut admitted that he "can't say" that the investigation, J.A. 21, 29, referenced any failures to write up tardy employees, except the asserted failure to code them as tardy when they clocked in at 7:00 a.m. Tr. 241. Defense witness, and former Personnel Manager, Jester agreed: "[W]here someone punched in at 7:00 o'clock and the supervisor didn't code it correctly ... that's what the whole case is about."[3] Tr. 324. Both Mrs. Sanderson and Chesnut testified that the problem with Mr. Reeves' not writing up his subordinates was that "we were in violation of our union contract [by] not disciplining people," Tr. 128, which could cause problems with the union. Tr. 127, 128, 154, 188-189, 206, 212, 266-267.

In an attempt to mitigate the effect of his age-based statements, Chesnut denied that he made the decision to fire Mr. Reeves. Instead, Chesnut claimed that his wife, Mrs. Sanderson, who was not accused of age-based statements, had, in reality, decided to fire Mr. Reeves. Tr. 207. Similarly, Chesnut repeatedly claimed he had no part in a 1993 decision to put Mr. Reeves on probation, Tr. 198, 199, 205, 236, 270-276, a claim which was also proved a lie by an affidavit Chesnut had earlier executed. Tr. 236-238.

Mrs. Sanderson, who was claiming she terminated Mr. Reeves, did not exactly understand the reasons being assigned

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[3] In other parts of his testimony, Chesnut claimed Reeves allowed employees to clock in early and be paid when they were not working, since the shift had not yet started. Mr. Reeves rebutted this evidence. Tr. 138, 142, 260, 263, 333-334, 335, 452.

for the firing. She thought the reason was "intentionally falsifying pay records." Tr. 100. There was absolutely no proof Mr. Reeves had ever intentionally falsified a pay record.[4] Mrs. Sanderson was so unfamiliar with the reasons for Mr. Reeves' firing that her counsel objected to her even being asked about the matter, saying that "she didn't do" the investigation. Tr. 127. Mrs. Sanderson even asked Mr. Reeves' counsel to refresh her memory about what the "codes" meant. Tr. 127.

Besides claiming that the age-biased Chesnut did not make the termination decision, the Defendant also rationalized age-based statements as "joking." Chesnut testified: "I don't remember ever referring to Mr. Reeves as an old man. I could have. I don't remember it. If I did it was kind of a joking manner, in the way it was done with a lot of other people." Tr. 215.

Chesnut did deny saying that Mr. Reeves was "too damn

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[4] The employer's case was based on contents of the investigation, which based its conclusions on the monthly reports (Exhibit D-4), and weekly reports (Exhibit D-3), both of which were done in data processing. Writeups for "tardies" were given only if one exceeded five percent of late work or three tardies in one month. Tr. 21, 38. Thus, only by examining the monthly reports could it be determined whether a worker should receive a writeup. The fact that Mr. Reeves did not do the monthly reports and only saw one monthly report, Tr. 20, 265, discredited the employer's claim that Mr. Reeves was fired for not giving writeups to his subordinates. A jury could therefore have reasonably concluded that Mr. Reeves was not fired for failing to give writeups, but for some other reason.

old to work here."[5] Chesnut defended any other age-based comments as "joking," or due to a "lax atmosphere," and said one older employee "enjoyed" age-based comments.[6]

Mrs. Sanderson testified there was no age discrimination, since the company has many older workers and supervisors. Tr. 155-156.[7]

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[5] However, Defendant's counsel did not phrase the question exactly the way Mr. Reeves had testified the comment occurred. Mr. Reeves had testified that Chesnut had said that he was too damn old to do "my job," whereas Defendant's counsel asked whether Chesnut had said Mr. Reeves was "too damn old to work here." Tr. 216.

[6] Chesnut testified that there were many old people who came back to work after retiring, and made whatever Social Security "allows" them to make, and that referring to them as "old man" is done simply because of the "lax atmosphere" at the plant. Tr. 215-216. Chesnut testified that Reeves himself had referred to employee John Williams as "old" since Reeves had stated that he would go "relieve the old man to let him to go to the bathroom." Tr. 215.

Chesnut related the case of Clyde Cook, who had retired and came back to work at seventy-three years old. Employees at the plant called Cook an "old man" and Cook "enjoyed" it. Tr. 216.

[7] However, she did not give any names of the alleged older supervisors. Tr. 155-156.

D. PETITIONER'S EVIDENCE OF PRETEXT

Mr. Reeves challenged as downright lies practically every item of Defendant's evidence. The defense that the results of the investigation caused Mr. Reeves' discharge was contradicted with Mr. Reeves' testimony that the only incident mentioned when he was fired was Coley's being paid for days she was hospitalized. Mr. Reeves testified there was no mention of an investigation until after his age discrimination complaint was filed. Tr. 17, 30, 48-49, 50-51, 306.

When the Defendant surmised that no jury would believe the Coley incident was the reason for Mr. Reeves' termination, a new and improved reason was meticulously constructed.[8] The jury was entitled to believe the investigation was an "after-the-fact inspiration triggered by the necessity of fending off this litigation." *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 21 (7th Cir. 1987).

Mr. Reeves challenged Mrs. Sanderson's claim that Chesnut was "low down in the company," Tr. 90-91, through cross-examination about a May 1994 Chesnut letter. Tr. 109-110, 113, 220, Exhibit P-7. When Chesnut's title was only "Quality Control Supervisor," he had written his boss, the Director of Manufacturing, a letter containing profanity and telling the boss to "wake up and learn to do his job." Tr. 109-

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[8] The Court of Appeals even acknowledged that the testimony justifying the firing meant the "investigation" was probably the product of "competent trial preparation," which it said was different from "telling a lie." Pet. App. 8a. But a jury was entitled to believe that defense counsel's changing the reasons for the discharge was itself indicative that the reasons originally assigned were not true.

110, 113, 220, Exhibit P-7.[9]

Besides the fact that this Chesnut letter might convince a reasonable juror that Defendant was lying about Chesnut's role at the company, Mr. Reeves and Mr. Oswalt repeatedly testified that the age-biased Chesnut had *de facto* control. Tr. 4, 10, 12, 14, 16, 36, 64, 65, 81-82.

There was also indisputable proof that Chesnut's claim that he had not participated in the probation decision was fabricated. Time and again, Chesnut had testified on direct examination that other decision-makers, not himself, caused Mr. Reeves to be placed on probation in 1993. Tr. 198, 199, 205, 235, 236, 275-276. But then, on cross-examination, Mr. Reeves' attorney produced Chesnut's signed affidavit when he swore that he had "recommended" Mr. Reeves be placed on probation in 1993. Tr. 236-238, Exhibit P-9.

Defendant's claim that Mr. Reeves had failed to properly code specific employees was also rebutted. Tr. 138, 142, 333-334, 335, 452).[10]

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[9] The Defendant then tried to justify this letter by claiming that Chesnut was not actually correcting a superior when he testified the Quality Control Supervisor was actually in an "equal" position with the Director of Manufacturing. Tr. 219. This absurdity was contradicted by Defendant's own witness, Lucille Reeves, who testified that the Director of Manufacturing is a higher job than Quality Control Supervisor. Tr. 306.

[10] Mr. Reeves denied that he had improperly coded employee Hogan, by testifying that employee Hogan's code

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The Defendant's attempt to blame Mr. Reeves for failing to write up tardy employees was refuted with Mr. Reeves' testimony that he had no dealings with the monthly codes from which writeups were given. Tr. 20. These writeups were solely Caldwell's job,[11] since he, alone, received the monthly

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[10](...continued)
was correct. Hogan wanted to remain at work and had been sent home against his wishes, making the code entry Mr. Reeves made correct. Tr. 333-334. Also, Mr. Reeves' counsel emphasized that Defendant never produced any documents explaining the codes, or explaining how Reeves' interpretation of the codes was incorrect. Tr. 452.

Mr. Reeves disputed Defendant's claim that Ms. Coley should have been written up for clocking in at 6:30 a.m. or 6:39 a.m. because she was clocked in and eating breakfast. To the contrary, Mr. Reeves testified that he allowed Ms. Coley to clock in early because she had extra work to do on those mornings. Tr. 334. There was also no explanation from Chesnut why if he saw Ms. Coley clocking in early and eating breakfast on company time, he did not fire her, or at least discipline her. *See* Tr. 258, 260, wherein Chesnut claims that he saw Ms. Coley being paid for not working on numerous occasions, but apparently did nothing about it. Chesnut also denied that he had improperly allowed employee Williams to check in early, testifying that Williams was required to arrive early in order to prepare for the 7:00 a.m. shift. Contrary to Defendant's testimony, there was no requirement that Williams check in at 6:00 a.m. Tr. 334-336.

[11] One gets a writeup only after he misses more than five percent of work a month. This can only be determined
(continued...)

reports after they were created in data processing. Tr. 138, 142, 335. Contrary to Defendant's testimony that the investigation was the result of workers leaving work early or excessive absences, the Defendant's own study contains no evidence anyone was leaving work early or had excessive absences. *See* J.A. 21, 29.

Chesnut knew the claim about workers being tardy was a farce. Chesnut himself testified that he was in the Hinge Room by 6:30 a.m. in the morning. Tr. 333-335. Therefore, Chesnut would have observed any workers who were tardy, and would not have needed any investigation to discover it. The record contains no testimony that Chesnut had ever corrected anyone about this.

Mr. Reeves testified that his workers were not late, but were on time, since he would see them at their work stations at 7:00 a.m., when he marked his daily time sheets. The time clocks often did not work. In these instances, Mr. Reeves wrote down 7:00 a.m. on his daily record, even though the workers actually arrived at work earlier. Workers who were coded as being there at 7:00 a.m. were thus on time. Tr. 39, 56, 84, 86, 214, 235, 243, 286. Mr. Oswalt corroborated this testimony, and said his practices were the same as Mr. Reeves'. Tr. 95.

An absurdity about Defendant's case developed from testimony about an adjustment of its time records. According to the Defendant, if workers arrived within ten minutes before 7:00 a.m., they were, under the Defendant's clock system, automatically clocked in at 7:00 a.m. Tr. 129, 191-192. This was done since they were not to be paid before the 7:00 a.m.

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[11](...continued)
from the monthly reports.

shift started. The Defendant then claimed that Mr. Reeves was fired for not making employees tardy when he marked they arrived at 7:00 a.m., but that Defendant's own computer system marked employees as arriving at 7:00 a.m., even though they arrived earlier!

There were also adverse inferences to be drawn from a lack of evidence produced by the Defendant. For example, there was no evidence that any supervisor's disciplinary practices were any different than Mr. Reeves. There was no evidence that any supervisor marked employees tardy when their time cards were marked 7:00 a.m. The only other supervisor about whom any records were introduced was Hinge Room Special Line Supervisor Oswalt. But Defendant's investigation lists *more* errors on the special line than on Mr. Reeves' regular line. J.A. 21, 29. The Defendant attempted to repair this gaping hole in the defense through Chesnut's testimony that Oswalt would himself have been fired if he had not quit work in July. Tr. 210-211. But this does not account for why the special line's claimed errors continued after July when Oswalt had left the company. Also, this argument defeated itself, since Chesnut's testifying that Oswalt "would have been fired" is inconsistent with the defense that Chesnut was *not* the person making termination decisions.

The jury probably questioned whether an employer, who presumably complies with federal law,[12] would have marked an employee as "tardy" for arriving at 7:00 a.m. when the employer required him to be there at 7:00 a.m. Tr. 249, 263. Can a company described by Chesnut as being "lax," be truthfully claiming that it is marking employees as tardy even though they are at the workplace at 7:00 a.m., when the shift

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[12] 29 U.S.C § 207.

starts?[13]

The attempt to defend on grounds of Mr. Reeves' probation in 1993 was turned into yet another example of discrimination. Mr. Reeves was placed on probation in 1993, Tr. 226, but the thirty-five year old Oswalt was not. However, their production records were basically the same, both good. Tr. 228-229. In addition, any relationship between the 1993 probation and the firing was disproved. After Mr. Reeves had been placed on probation in 1993, Tr. 113, he had thereafter received a merit pay raise. Tr. 16-17.

One reason Defendant had given for launching the investigation was that "efficiency" was down. However, on cross-examination of Chesnut, it was demonstrated the actual records showed Mr. Reeves' efficiency level at the time was sixty units per man hour, far above the company's efficiency goal of forty-eight units per man hour.[14] Tr. 16-17. According to Chesnut, "efficiency" is the best test of how a supervisor is performing. Tr. 230.

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[13] Defendant may claim that it did not have to pay employees who clocked in at 7:00 a.m. but only reached the line at 7:00 a.m., because any time for which they were not paid would be "de minimus." *See Mireles v. Frio Foods, Inc.*, 899 F.2d 1407 (5th Cir. 1990). If so, Defendant must be claiming that it fired Mr. Reeves for not disciplining employees over de minimus periods of time.

[14] While the personnel file does contain a letter where Caldwell states that he placed Mr. Reeves on probation, Mr. Reeves testified that Caldwell had told him that this had been directed by Chesnut. Tr. 66.

Mr. Reeves was also treated differently from others in the same situation. Mr. Oswalt testified that the only remedy in the past when an employee, such as Coley, had been overpaid was to simply withhold payment from the employee's next paycheck. Tr. 72.

Defendant's claim of union problems was also a farce. On cross-examination it was revealed that there had never been a single claim by the union of unequal treatment by a supervisor. Tr. 267.

Contradicting Mrs. Sanderson, Mr. Reeves testified that at the time he was fired he knew of no supervisor at the plant older than himself. Tr. 333.

At the close of the proof, the district court again denied Defendant's motion for judgment as a matter of law. J.A. 9.

E. THE JURY VERDICT

After receiving the instructions from the trial judge that the Court of Appeals did not challenge, R. 231-254, the jury found that Defendant had been guilty of willful age discrimination. R. 224-228. Accordingly, the Court entered a jury verdict for the amount of Mr. Reeves' back pay ($35,000.00), less interim earnings, and doubled the lost wages to Seventy Thousand Dollars ($70,000.00) pursuant to the willful finding. R. 224, 262-263.

After the trial, Defendant again moved for judgment as a matter of law, which the district judge denied. R. 264-266, J.A. 9. The district judge also awarded front pay ($28,490.86) to Mr. Reeves. R. 227, J.A. 9.

F. THE APPEAL

The Fifth Circuit followed its practice of reviewing all of the evidence "*de novo*" to determine whether the evidence is sufficient to support the verdict. *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*). After reviewing the evidence, the Court decided that Petitioner had produced insufficient evidence of age discrimination.

The Court of Appeals found that Petitioner "very well may be correct" that "based on the evidence...a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual." Pet App. 8a. The Court nonetheless stated:

> whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decisions.

Id. The Court of Appeals then proceeded to discount Petitioner's evidence of prejudicial statements by a decision-maker because "it is clear that these comments were not made in the direct context of Reeves's termination." *Id.* at 9a. The Fifth Circuit apparently concluded that little short of direct evidence made at the time of Petitioner's discharge would be sufficient to sustain a jury verdict of ADEA liability.

In reviewing the jury verdict, the Fifth Circuit made various of its own findings of fact without regard to whether the jury could reasonably have found to the contrary. For example, the Court of Appeals asserted that "Chesnut was just one of three individuals who recommended to Ms. Sanderson that Reeves

be terminated," and that "at least two of the decision makers were themselves over the age of 50," *id.* at 7a-8a, even though Petitioner presented evidence at trial that Chesnut was Respondent's sole decision-maker. The Court of Appeals also downplayed the significance of Respondent's prevarication in explaining to Petitioner why he was discharged:

> [a]lthough proof that an employer lied to its employee about its reason for discharge does, under some circumstances, raise a 'red flag' of pretext, the inconsistency noted by Reeves in this case can hardly be considered mendacious.

Id. at 9a. Having thus weighed the evidence presented by both parties, the Fifth Circuit rejected the jury's verdict and concluded that "there was insufficient evidence for a jury to find that Sanderson discharged Reeves because of his age."

SUMMARY OF ARGUMENT

The Fifth Circuit held that proof that a member of the disfavored class was replaced by a member of the favored class, combined with evidence that the employer's explanation is pretextual, and other circumstantial evidence, are insufficient to permit a jury to infer discrimination. This contravenes *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), which established that just such a circumstantial case is sufficient to allow a fact finder to infer discrimination. This Court expressly so stated in *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

The fact that Mr. Reeves was replaced by less-efficient, much younger employees, and that the reasons given for this replacement were all contrived, left the logical inference that age is the reason for the termination. Any doubts about

whether age, rather than some other arbitrary reason, caused Mr. Reeves' discharge was resolved by the jury in Mr. Reeves' favor. The fact that the company's "absolute power" (Chesnut) had earlier manifested an age-bias against Mr. Reeves is circumstantial evidence sufficient to cause a jury to infer that age-bias was the cause of Mr. Reeves' dismissal.

The Court of Appeals was also wrong to consider without limitation "all of the evidence," when deciding whether or not to grant judgment as a matter of law.

In ruling on such a motion, a court may not (1) credit testimony by witnesses for the moving party over contrary testimony by witnesses for the non-moving party; (2) resolve disputes about what inferences should be drawn from the evidence of the moving party; or (3) attempt to balance the weight of the evidence submitted by the parties. The Court of Appeals violated each of these precepts.

The proper test for deciding whether to grant judgment as a matter of law involves consideration only of the non-movant's evidence, together with any unimpeached, uncontradicted testimony by the movant from unbiased witnesses. Only when the evidence of the moving party is uncontradicted and unimpeached or otherwise "conclusive" may it be relied upon to grant judgment as a matter of law.

Had the Court of Appeals considered only the non-movant's evidence, together with any uncontradicted and unimpeached evidence of unbiased witnesses of the movant, the test utilized would be the same as that utilized for summary judgment under Fed. R. Civ. P. Rule 56. This Court has previously held that Fed. R. Civ. P. Rule 56 and Fed. R. Civ. P. Rule 50 substantive standards are the same. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986). *Anderson*

dictates reversal since there were disputed "issues of material fact," in view of the contradictions between Mr. Reeves' evidence and Defendant's evidence on whether age bias caused Mr. Reeves' firing.

This Court should also hold on appeal the standard of review for denial of a Rule 50 motion is different from that for a Rule 56 motion. It is proper on appeal to consider a motion for summary judgment "*de novo*." The court of appeals has the same opportunity to review the evidentiary materials on file as does a district court.

However, once there has been a jury trial, and a Rule 50 motion has been denied, deference should be given to the trial judge's and jury's understanding and evaluation of the evidence. The trial judge and jury had the opportunity to hear and see the witnesses. The appeals court did not.

Just as the Seventh Amendment requires deference be given to a trial judge's ruling to deny a motion for new trial, *Gasperini v. Center for Humanities*, 518 U.S. 415, 435-436 (1996), the same deference should be given the decision of the trial judge and jury on a motion for judgment as a matter of law.

ARGUMENT I.

EVIDENCE THAT PETITIONER WAS DISPLACED BY A YOUNGER EMPLOYEE FOR PRETEXTUAL REASONS AND OTHER CIRCUMSTANTIAL EVIDENCE ADEQUATELY SUPPORT A JURY FINDING OF AGE DISCRIMINATION.

Mr. Reeves produced evidence that the reasons given for replacing him with younger employees were a pack of lies. The Defendant lied when it claimed the age-biased Chesnut did not make the decision to fire Mr. Reeves. It lied when it claimed the age-biased Chesnut did not participate in the probation decision in 1993. It lied when it claimed the results of an investigation caused his firing. Perhaps grudgingly, the Fifth Circuit conceded that "Reeves very well may be correct" on his pretext argument. J.A. 19. Nevertheless, the Court of Appeals ruled there was no "substantial evidence" of age discrimination. The Fifth Circuit refused to permit a jury to infer age discrimination from the fact that Mr. Reeves was replaced by younger employees for pretextual reasons, or from Mr. Reeves' other indirect evidence. This refusal to accept circumstantial evidence as adequate reflects a disagreement among the court of appeals over the meaning of *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

Hicks held that a finding that a member of the disfavored class was replaced by a member of the favored class for "pretextual" reasons does not *compel* a finding of age discrimination. But the courts of appeals have differed over the question of whether a finding that a member of a disfavored class was replaced by a member of the favored class, coupled with proof of pretextual reasons, permits a jury to infer discrimination. The majority of the courts of appeals have allowed a jury finding to be upheld if there is proof that a

member of the disfavored class is replaced by a member of the favored class for pretextual reasons.[15]

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[15] *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 347 (6th Cir. 1997) ("The import of the *Hicks* decision in this circuit is that once a plaintiff has disproved the reasons offered by the defendant, the fact finder is permitted to infer discrimination. A plaintiff does not need to introduce additional evidence of discrimination to prevail on the merits"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1535 (11th Cir. 1997) ("*Hicks* ... means ... that evidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions, taken together with the plaintiff's *prima facie* case, is sufficient to support (but not require) a finding of discrimination"); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-67 (3rd Cir. 1996) ("[w]e have understood *Hicks* to hold that the elements of the *prima facie* case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110 (8th Cir. 1994) ("Based upon the elements of the plaintiff's *prima facie* case and the jury's rejection of the defendant's explanations, the jury could infer that discrimination had occurred"); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) ("*Hicks*...states that the plaintiff may prevail in a discrimination case by establishing a *prima facie* case and by showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false ... '[N]o additional proof is *required*") (emphasis added); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("[t]here will always be a question for the factfinder once a plaintiff establishes a *prima*

(continued...)

On the other hand, a minority of the Courts of Appeals have required direct evidence, finding proof of pretext alone is insufficient to present a jury question on discrimination.[16]

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[15](...continued)
facie case and raises a genuine issue as to whether the employer's explanation for its action is true").

[16] *See Bienkowski v. American Airlines*, 851 F.2d. 1503, 1508, n. 6 (5th Cir. 1988) (Pre-*Hicks*, proving pretext alone insufficient because it would hold employers liable for firing employee for arbitrary, but non-discriminatory reasons, as is permitted by the employment-at-will doctrine); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 443 (11th Cir. 1996) (majority rule is "hurtful to employers"); *Price v. Marathon Cheese Corp.*, 119 F.3d. 330, 337 (5th Cir. 1997); *LaBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993) (in order to sustain finding of discrimination, there must be proof not only of "'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus").

Discussions of the split of authorities among the Circuits are found in Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses; the Fallacy of the 'Pretext Plus' Rule in Employment Cases*, 43 Hst. L.J. 57 (1991); Jody H. O'Dell, *Between Pretext Only and Pretext-Plus; Understanding St. Mary's Honor Ctr. v. Hicks and its Application to Summary Judgment*, 69 Notre Dame Law Rev. 1251 (1994); Frank J. Caviliere, *The Recent Respectability of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases; ADEA Analysis Through the Supreme Court Summary Judgment Prism*, 41 Clev. St. L. Rev. 103 (1993).

The Fifth Circuit's holding is inconsistent with the following language from *Hicks*:

> The fact finder's disbelief of the reasons put forward by the Defendant (particularly if this belief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that upon such rejection, "no additional proof of discrimination is required."

509 U.S. at 511 (emphasis in original).

Defendant will no doubt claim that the above language in *Hicks* is overcome by the statement in the *Hicks* opinion that the employee must show "both the reason was false and discrimination was the real reason." *Id.* at 515. Mr. Reeves agrees that he must show that discrimination was the real reason. The issue, however, is whether he can make this showing through proof that he was replaced with a much younger employee for pretextual reasons.

The Fifth Circuit's view was also rejected in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis in original):

> ... We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the

> employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Obviously, the Fifth Circuit comes dangerously close to requiring direct evidence ("I'm firing you because you are too old."). For example, the Fifth Circuit rejected the proof that Mr. Reeves was treated far differently than the much younger employee who was his co-supervisor. It rejected the proof that a decision-maker (Chesnut) had made age-based statements, including telling him that he was "too damned old for the job." It rejected the proof that Mr. Reeves was replaced by much younger, less efficient supervisors on three occasions. If this indirect evidence does not suffice, little short of direct evidence will do.

Requiring direct evidence is inconsistent with this Court's long-established model for proving discrimination cases. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), held that a plaintiff, seeking to prove intentional discrimination, may make this proof by establishing a *prima facie* case with proof that he (a member of the disfavored class) was replaced by a member of the favored class. The Defendant must then articulate a legitimate, non-discriminatory reason for the disputed action, after which Plaintiff then bears the burden of persuading the trier of fact that the proffered explanation was pretextual. As this court said in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981), the plaintiff has:

> the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason motivated the employer or indirectly by showing that the employer's proffered explanation is

unworthy of credence.

The Fifth Circuit's holding, which will usually result in requiring direct evidence, contravenes the *McDonnell-Douglas* and *Burdine* line of authority.[17]

Patterson v. McLean Credit Union, 491 U.S. 164, 187-188 (1989), held there are various ways to prove discrimination, and showing the displaced employee was better qualified is only one of the accepted methods. In making this point, this Court equated proof of pretext as one method of proof of intentional discrimination. In holding proof of pretext is not sufficient to prove intentional discrimination, the Fifth Circuit disregards *Patterson*.

Furthermore, forbidding the jury to find discrimination, from the fact the employer lied about its reasons is inconsistent with well-established precedents. Many cases allow adverse inferences to be drawn from the fact that a witness has lied. In the criminal law context, a jury is permitted to infer guilt from the fact that a Defendant gave a false exculpatory statement:

> ...If the jury were satisfied from the evidence that false statements in the case were made by defendant ... they had the right, not only to take such statements into consideration in connection with all the other

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[17] Even under this approach, there might be a theoretical case where circumstantial evidence would suffice. For example, a company which for the last ten years had fired everyone reaching age fifty could be held liable without direct proof. But most employers are sufficiently aware of the discrimination laws so as to make such a extreme case unlikely.

> circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation of defense ... as in themselves, tending to show guilt. The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury.

Wilson v. United States, 162 U.S. 613, 620-21 (1896).[18]

This is a hornbook principal. According to 2 John H. Wigmore, *Evidence in Trials at Common Law*, § 278(2) (Chadbourne Rev. 1979):

> It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party's falsehood ... in the preparation and presentation of his cause ... is receivable against him as an indication that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.

Most significantly, forbidding juries to infer discrimination

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[18] *Accord United States v. Hughes*, 716 F.2d 234, 240-41 (4th Cir. 1983); *United States v. Rajewski*, 526 F.2d 149, 160 (7th Cir.), *cert. denied*, 426 U.S. 908 (1976); *United States v. DeVore*, 368 F.2d 396, 397 (9th Cir. 1966); *United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982); *United States v. Johnson*, 46 F.3d 1166, 1171 (D.C. Cir. 1995).

from the employer's lies[19] is inconsistent with the constitutional mandate that inferences to be drawn from the facts must be left to the jury. *Sioux City and Pacific R.R. Co. v. Stout*, 84 U.S. 657, 664 (1873) ("It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge"); *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) ("The very essence of [the jury's] function is to select among conflicting inferences and conclusions that which it considers most reasonable"); *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999) (where reasonable inferences from undisputed facts can lead to either of two conclusions, it is error to resolve this issue of fact by summary judgment).

Obviously, there are at least two possible inferences that can be drawn from the fact that the Defendant lied about its reasons for preferring younger employees to an older one. One

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[19] According to "pretext plus," allowing "pretext" to prove discrimination would undermine that public policy which allows employers to fire employees for arbitrary reasons or without "just cause." *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508, n. 6 (5th Cir. 1988). But employment at-will is a doubtful policy in Mississippi. *See McArn v. Allied Bruce Terminix*, 626 So.2d 603, 606-607 (Miss. 1993) (public policy exception to employment at-will); *Bobbitt v. The Orchard, Ltd.*, 603 So. 2d 356 (Miss. 1992) ("We disposed of the argument that such a rule was fair because the employee was as free to quit as the employer to discharge him, and also signaled our direction for the future with the following comment: '[T]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'").

such inference is the Defendant discriminated on the grounds of age. This is a particularly logical inference in view of Chesnut's comments about Reeves' age.

Of course, it is not the only possible inference. Another possible inference is that the employer had some undisclosed reason for the decision. But the settled law is that the jury decides which inference to draw. *Hunt v. Cromartie*, *supra*.

Besides rejecting Mr. Reeves' evidence as insufficient, the Court of Appeals also relied on other evidence of a lack of discrimination. For example, the employer emphasized that it also fired Caldwell (age forty-five). It claimed it has many other older supervisors. This type of statistical argument was rejected, as conclusive evidence of non-discrimination, in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 878-879 (1984):

> A racially balanced workforce cannot immunize an employee for liability for specific acts of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978). A piece of fruit may well be bruised without being rotten to the core.

A reasonable jury could find the employer fired Mr. Reeves because of his age but fired Caldwell for non-age reasons, such as his decision to credit Genie Mae Coley for work hours when she was hospitalized. No law requires that all of an employer's terminations be for the same reason.

Whether to accept the firing of Caldwell as persuasive evidence that Mr. Reeves was not the victim of age discrimination was but one factor for the jury to consider. In view of the other evidence, a jury was entitled to be as skeptical

of Defendant's statistical evidence as was Mark Twain.[20]

Similarly, the Court of Appeals' reliance on decision-makers Mrs. Sanderson and Jester being over fifty was misplaced. The jury was entitled to believe the termination decision was made by the age-biased Chesnut. Furthermore, many cases recognize that the motives of *all* decision-makers need not be proved to establish a discrimination case. *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985)(two members of five member selection committee had made biased recommendations).[21]

The Fifth Circuit also erred in ruling that the jury was not

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[20] "There are three kinds of lies: lies, damn lies and statistics."

[21] *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998) (discriminatory remarks of those who may have influenced the employment decision are relevant when the plaintiff challenges the motive behind that decision); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1311-1312 (D.C. Cir. 1998) (evidence of subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence); *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 347, 348 (1st Cir. 1998) (finding of discrimination supported by remark made by official who "participated closely" in termination decision); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 922 (3d Cir. 1997) (finding of discrimination supported by remark by company official who participated in the process that resulted in termination); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) (finding of discrimination supported by remarks of official who "played a role" in the termination decision).

allowed to infer discrimination from age-based comments, such as Chesnut's informing Mr. Reeves that he was fired because he was "too damn old" to do the job. Prior expressions of attitudes or emotions have long been regarded as probative evidence to explain later actions. 2 John H. Wigmore, *Evidence in Trials at Common Law*, §395-406 (1940). If a jury believed that Chesnut had manifested an age bias against Mr. Reeves in late August 1995, it could reasonably believe that he still adhered to these biased views, and was acting upon them, when he fired Mr. Reeves two months later in October 1995. "...[S]tereotyped remarks can certainly be evidence that [age] played a part" in the decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).[22]

Similarly, the Fifth Circuit's finding that evidence that Mr. Reeves was treated much more harshly than a much younger supervisor does not support a finding of discrimination is

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[22] Many lower court cases have recognized this. For example, see authorities cited in note 21, *supra*. "The very essence of [the jury's] function is to select among conflicting inferences ..." *Tennant v. Peoria & P.U.R.. Co.*, 321 U.S. 29, 35 (1944). For an appeals court to decide that age-based comments by a decision-maker shortly before firing an employee do not prove the firing was age-motivated, but non-discrimination, because this same decision-maker also fired someone else for non-age reasons, is the epitome of an improper invasion of the jury's basic function. Courts are not free to reweigh the evidence and enter the verdict they think the jury should have reached merely because they believe the inferences they draw are more reasonable. *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985). Whether a "discriminatory motive" exists is an issue for the jury. *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999).

inconsistent with *McDonald v. Santa Fe Trail Transp. Corp.*, 427 U.S. 273 (1976), which held that firing white thieves, while permitting black thieves to continue their employment, constituted race discrimination. Similarly, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977), noted proof of discrimination can be inferred from differing treatment of members of the disfavored class.

In short, by effectively requiring that persons claiming discrimination can prevail only by producing direct evidence of bias in the decision making process itself, the Fifth Circuit ruled in a manner wholly inconsistent with this Court's decisions. If sustained, this ruling would produce a result, like this one, that seriously undermines the ability of victims of discrimination to enforce our Nation's laws forbidding age, race, gender, and national origin bias in employment matters.

ARGUMENT II.

THE COURT OF APPEALS ERRED IN EXAMINING ALL OF THE EVIDENCE TO DETERMINE WHETHER JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED. THE COURT SHOULD HAVE USED THE SAME STANDARDS USED IN CONSIDERING A SUMMARY JUDGMENT MOTION.

HOWEVER, UNLIKE REVIEW OF A DENIAL OF A RULE 56 MOTION, AN APPEALS COURT SHOULD GRANT DEFERENTIAL REVIEW TO A DECISION OF A TRIAL JUDGE TO DENY A RULE 50 MOTION.

In granting judgment as a matter of law, the Fifth Circuit considered all of the evidence, not just the non-movant's evidence. This follows its leading decision in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969)(en banc) which states:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just the evidence which supports the non-movant's case . . . . There must be a conflict in substantial evidence to create a jury question.

Boeing contains a vigorous dissent by Judge Reeves who argued the decision could not be reconciled with the Seventh Amendment or with *Galloway v. United States*, 319 U.S. 372, 395 (1943), or *Lavender v. Kurn*, 327 U.S. 645 (1946). *Boeing*, 411 F.2d at 394. Judge Reeves accused the *Boeing* majority of "error of constitutional proportions which will continue to plague this Court and the district courts of this Circuit until the Supreme Court grants certiorari on this or some future case and

corrects the error."

Consistent with the *Boeing* dissent, other Circuits have given more deference to a jury than does the Fifth Circuit. As Justice White noted:

> In the Eighth Circuit, however, it appears that the only evidence which supports the verdict winner is to be considered. *Simpson v. Skelly Oil Co.*, 371 F.2d 563 (8th Cir. 1967). The First and Third Circuits follow a middle ground: The reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. *Lane v. Binzont*, 657 F.2d. 468, 472 (1st Cir. 1981); *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33 (3d Cir. 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue. ...this disagreement among the federal courts of appeals is of far more than academic interest.

Venture Tech., Inc. v. National Fuel Gas Distribution Corp., 459 U.S. 1007 (1982) (White, J., dissenting).

Shunning the Rule 56 "issues of material fact" standard, the Fifth Circuit relied upon the movant's (employer's) evidence which was contradicted by Mr. Reeves' evidence. For example, Mr. Reeves' evidence was that the age-biased Chesnut was the "absolute power." On the other hand, Defendant's corporate representative testified at deposition that age-biased Chesnut was only one of four joint decision-makers. Then, all of the employer's witnesses testified at trial that Mrs. Sanderson made the decision. The Fifth Circuit rejected Mr. Reeves' contradictory evidence that the prejudiced Chesnut actually "ran the company," and accepted as the truth the employer's deposition testimony, which minimized Chesnut's

role.

In view of the fact that the testimony the Fifth Circuit relied upon was directly contradicted by Mr. Reeves' evidence, the decision to consider *all* of the evidence was improper. A respected commentator has urged this is error:

> The correct view seems to be that the district court may consider all of the evidence favorable to the position of the party opposing the motion for a judgment as a matter of law as well as any unfavorable evidence that the jury is required to believe.
>
> Thus, a judge may take into account evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses. Statements that all of the evidence is to be considered are too broad. Unfavorable evidence that contradicts the favorable evidence must be disregarded, as must evidence that is admitted for limited purposes, such as impeachment.

Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2529 at 297-99 (2d ed. 1994).

Considering only non-movant's evidence — together with any uncontradicted and unimpeached evidence from disinterested witnesses produced by movant — is consistent with both the common law and with the decisions of this Court. The beginning point must be the Seventh Amendment teaching that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than ... according to the rules of the common law." U.S. Const. amend. VII.

The "rules of the common law" have been described in many authorities, including *Galloway v. United States*, 319 U.S. 372, 393-94 (majority opinion), 399-400 (Black, J. dissenting) (1943); *Slocum v. New York Life Ins.*, 228 U.S. 364, 388-92 (majority opinion), 409-17 (Hughes, J., dissenting) (1913). What follows is a short summary of the "rules of the common law."

The common law analogy to a directed verdict is a demurrer to the evidence. Under this procedure, the moving party was required to stipulate the truthfulness of the evidence produced by the non-movant. As Justice Story has explained, the party demurring to the evidence must "distinctly admit, upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to proof." *Fowl v. Common Counsel of Alexandria*, 24 U.S. 320, 322 (1826). As put in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 388 (1913), "a demurrer to evidence ... must contain an express and direct admission by the demurrant of every fact which the evidence of the adversary conduces to prove ... ." *Webb v. Illinois Cent. R.R.*, 352 U.S. 512, 513-14 (1957) held:

> In passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.

Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949) said:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inferences which tend to support the case of the litigant against whom a peremptory instruction has been given.

Thus, cases from *Foul* in 1826 to *McCarthy* in 1949 have reiterated the "rules of the common law" of considering *only that evidence supporting the non-movant*. These authorities describing the common law have been modified by this Court's modern decisions, only to the extent the Court allows consideration of the *uncontradicted* and *unimpeached* or "conclusive" evidence of the movant. For example, *Texas v. Lesage*, ___ U.S. ___, 120 S.Ct. 467, 468 (1999), approved a grant of summary judgment where the movant's evidence established, without contradiction, that the non-movant (Plaintiff) could not have been admitted to the academic program in issue, even if there had been no race discrimination against him. In *Lesage*, besides the non-movant's evidence, the *uncontradicted* and *unimpeached* or "conclusive" evidence of the movant was considered. 120 S.Ct. at 468.

But this is not a case where the movant showed *conclusively* or through uncontradicted and unimpeached evidence, that there was a lack of age discrimination. To the contrary, each piece of evidence offered by the Defendant was *contradicted* by Mr. Reeves' evidence, or impeached by cross-examination or prior inconsistent statements. In such a situation, the "rules of the common law" command only non-movant's evidence be considered.

The Fifth Circuit's practice of considering all the evidence results in the Appeals Court's *balancing* the evidence to decide which side it believes. For example, in this case, Mr. Reeves' evidence was that Chesnut was the "absolute power." The Defendant's testimony was to the contrary and that four people made the termination decision. The Fifth Circuit weighed the evidence on both sides and agreed with Defendant, finding a termination decision by four persons, two of whom were over fifty.

Consideration of "all of the evidence" thus causes the appeals court to weigh the evidence so as to determine which evidence it believes. This contravenes *Richmond & Danville R.R. Co. v. Powers*, 149 U.S. 43, 47 (1893):

> It is true that there was testimony tending to show a different state of facts ... But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court....

According to *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891):

> The jury were the judges of the credibility of the witnesses ... and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to a jury, who are presumed to be fitted for it by their natural intelligence and a practical knowledge of men and the ways of men....

The Appeals Court accepted as true the employer's denial of age discrimination. But granting credibility to Defendant's witnesses runs afoul of *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408 (1899):

> [T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.

This also contravenes *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468 (1962), which discounted the value of affidavits from company officials, since "it is readily apparent that each of these persons was an interested party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624-25 (1941) also discounted the value of affidavits of interested witnesses.

By deciding to credit Defendant's denial of discrimination, the Fifth Circuit is inconsistent with *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct. 1545, 1552 (1999):

> Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. Summary judgment ... is inappropriate where the evidence is susceptible of different interpretations or inferences by the trier of fact.

Of course, *Boeing v. Shipman*, *supra*, denied an intent to authorize "balancing" the evidence. But this case demonstrates that a court cannot consider *all* of the evidence without balancing it to decide which to believe. An appellate court is not the forum to make credibility choices. This displaces the jury. "The very essence of [the jury's] function is to select among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & P.U.R.. Co.*, 321 U.S. 29, 35 (1944). As stated in *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879), "If the Court admits ... testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony."

The Fifth Circuit's consideration of *all* of the evidence of the moving party contradicts the *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986) teaching that the standard for directed verdicts under Rule 50, and for summary judgment under Rule 56, are the same. If one considers *only the non-*

movant's evidence, and uncontradicted, unimpeached evidence of the movant, issues of material fact exist under Rule 56. Contradictions between Plaintiff's evidence and Defendant's evidence on material points (e.g., identity of the decision-maker) created issues of material fact. Established summary judgment procedure requires the court to disregard movant's evidence which is contradicted by non-movant's evidence. Contradiction in evidence on material points precludes summary judgment under Rule 56. *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

The contradictions in the evidence on material points should have precluded a directed verdict under Rule 50 for the same reason they preclude summary judgment under Rule 56. Otherwise, this Court's direction to equate the two motions has not been followed. *See* Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla. St. U.L. Rev. 689, 712 (1996) (arguing that denial of summary judgment should ordinarily bar grant of judgment as a matter of law under the "law of the case" doctrine).[23]

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[23] Liberal use of Rule 56 summary judgment procedures has already eliminated many cases without a jury trial. *See* Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897 (1998); William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus" and the Escalating Subordination of Federal Employment Discrimination Law for Employment at Will: Lessons from McKennon and Hicks*, 30 Ga. L. Rev. 305 (1996); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII* (continued...)

However, Rule 56 and Rule 50 differ in one important particular. This is the standard of review on appeal. A summary judgment motion involving no jury trial is subject to *de novo* review. E.g., *Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir. 1989); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989); *Thrasher v. State Farm Fire & Cas. Ins. Co.*, 734 F.2d 637 (11th Cir. 1984). This is quite proper. The appeals court has the same opportunity to review the evidence as the trial judge. However, a Rule 50 motion, unlike a Rule 56 motion, must take into account the Seventh Amendment prohibition of re-examination of the findings of a jury except according to "the rules of the common law." The rules of the common law forbid any appeal of a jury's fact finding.[24]

As stated in 2 *The Complete Anti-Federalists* at ¶ 2.8.194:

> By the common law, in Great Britain and America, there is no appeal from the verdict of the jury, as to

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[23](...continued)
and ADEA Cases, 34 B.C. L. Rev. 203 (1993).

[24] *See* Chief Justice Rehnquist's dissent in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979) and Justice Scalia's dissent in *Gasperini v. Center for Humanities*, 518 U.S. 415, 435-436 (1996). *See also* M. Horowitz, *The Transformation of American Law*, 28-29, 141-43 (1977); Johnston, *Jury Subordination Through Judicial Control*, 43 Law & Contemp. Probs., at 24, (Autumn 1980); W. Holdsworth, *A History of English Law*, 298-350 (7th ed. 1956); J. Thayer, A Preliminary Treatise on Evidence at the Common Law, 137-262 (1898); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. Law Rev. 639, 731 (1973).

facts, to any judge whatsoever.

According to 3 William Blackstone, *Commentaries on the Laws of England*, 405-406 (1st ed. 1768):

> The writ of error only lies upon matters of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict.

Since the English common law, at the time of the adoption of the Seventh Amendment[25], did not allow any appellate review of a jury's fact finding, appellate reversal of jury fact finding, to meet Seventh Amendment Standards under Rule 50, must be highly deferential, if at all.

Practical considerations also indicate that an appeals court should avoid, wherever possible, granting judgment as a matter of law on the grounds the jury and trial judge erred in finding the facts. Trial judges (and jurors) have the "unique opportunity to consider the evidence in the courtroom context," which makes them a more accurate fact finder than appeals court judges who see only the "cold paper record." *Gasperini v. Center for Humanities*, 518 U.S. 415, 435-438 (1996). Trial judges (and jurors) have:

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[25] The "common law" referred to the Seventh Amendment in the English common law, at the time of adoption of the Seventh Amendment, not the common law as modified by statutes or rules in the various states. *Capital Traction Co. v. Hof*, 174 U.S. 1, 8 (1899).

> personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses ... and ... the feel of the case which no appellate printed transcript can impart.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1947).

The facts of this case had the undivided attention of the trial judge and jurors for four days. The trial judge reviewed the evidence four times and four times found the evidence was adequate. On the other hand, the appeals court reviewed the evidence at oral argument when its attention was divided among three other cases. The appeals court heard a summary of the evidence secondhand, from the lawyers. With these disadvantages, it is not surprising that the appeals court misunderstood the facts in several particulars.[26]

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[26] A glaring error was the Fifth Circuit's finding that two of the decision-makers (Sanderson and Jester) were over fifty. (Pet. App. 9a). To the contrary, Mr. Reeves' evidence was that age-biased Chesnut alone had to be pleased in order for one to keep his job.

Other significant factual errors in the Court of Appeals' opinion include the statements that:

(a) "Reeves was required to keep daily, weekly, and monthly records of the attendance and tardiness of employees under his control." (Pet. App. 2a). Actually, the weekly and monthly records were kept by the personnel department. Reeves never even saw a monthly report except on one occasion. Tr. 20. Yet, Defendant claims he was fired for not

(continued...)

[26](...continued)
giving writeups which could only be ascertained from the monthly reports he never saw!

(b) "[Sanderson] argues, employees under Reeves' control ... were not being disciplined for their habitual absenteeism." (Pet. App. 7a) In fact, Defendant's study had never identified a problem of absenteeism, and the only case in which a worker was incorrectly recorded as present involved an employee who was in the hospital. This error is important because Exhibit D5-A actually exonerates Mr. Reeves of having covered up absenteeism.

(c) "Th[e] investigation revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves and Oswalt." (Pet. App. 3a) In fact, nearly all of the incidents to which the study objected concerned Mr. Reeves' failure to place on "01" code on the sheets of employees listed as starting work at 7:00 a.m. rather than 6:59 a.m., a matter that involved neither inaccurate time records nor misrepresentations. The parties were in sharp disagreement about whether the lack of that "01" code was improper at all, and about whether any such error was trivial. The Court of Appeals, however, appears not to have understood either the contents of the report or the nature of that dispute, especially since such details are easily overlooked when one is attempting to digest the cold record as opposed to listening, one at a time, to each witness.

(d) "The fact remains that as a result of the 1995 investigation, each of the three hinge room supervisors was accused of inaccurate recordkeeping, including not only Reeves and Caldwell, but thirty-five year old Oswalt as well." Pet.
(continued...)

The type of tedious, workplace issues involved in this case are those for which appeals court judges have no expertise and little experience. Realities of discipline in a factory workplace are far more familiar to ordinary working people who sit on juries than to appellate judges. Jurors accustomed to working in a factory environment are in a far superior position to judge the truthfulness of the employer's claim that a union would be dissatisfied with Mr. Reeves' alleged lax treatment of workers. Persons who work in a factory environment and sit on juries are in a superior position to judge the plausibility of Defendant's claim that workers were regarded as tardy if they clocked in at 7:00 a.m. when the shift started. Jurors who observe the demeanor of witnesses are in a superior position to judge whether or not Mr. Reeves was truthful when he testified Chesnut dominated the company.

A district judge who presides over the trial also has the same advantages of observing the demeanor of witnesses as do jurors. "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact determination and at a high cost in

[26](...continued)
App. 3a. Actually, there is no evidence Oswalt was accused of inaccurate timekeeping. Mr. Reeves was accused only *after* this case was filed. Furthermore, the Court of Appeals evidently believed, from the above quotation, that the study of personnel records occurred in the summer of 1995, while Oswalt was still employed, and he had avoided dismissal only by quitting before Mrs. Sanderson could act on the accusations against him. In fact, Oswalt resigned on August 1, 1995, and the study did not occur until October of 1995, and Defendant would have known at that time that it could not lead to any action against the departed Oswalt.

diversion of judicial resources." *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985). "The cost of providing 'duplicate' decisions ... outweigh the benefits ... of *de novo* judicial review." *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993).

For these reasons, the Fifth Circuit erred in reviewing the evidence *"de novo,"* as would be proper when considering an appeal of a Rule 56 summary judgment ruling. The correct practice is that of the Eighth Circuit to:

> ... give great credence to the findings of the jury and the trial judge. They heard the testimony and reviewed the evidence firsthand; ... Appellate courts should be extremely reluctant to interfere with a verdict where twelve jurors sit through a long trial and an experienced and competent trial judge finds no error in the jury's determination.

Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1245 (8th Cir. 1985).

Indeed, a deferential standard of review of denial of a Rule 50 motion is commanded by *Patton v. Texas & Pacific Railway Co.*, 179 U.S. 658, 660 (1900):

> hence, it is seldom that an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict ... the judge is primarily responsible for the just outcome of the trial ... He has the same opportunity that jurors have for seeing the witnesses, for noting all of those matters in a trial not capable of record ... an appellate court will pay large respect to his judgment.

Rule 52(a) of the Federal Rules of Civil Procedure addresses the standard of review of a district court's findings of fact, permitting reversal on appeal only if the trial judges fact finding is "clearly erroneous." Why are the trial judge's rulings so suspect that they are reviewed "*de novo*" when he finds that the jury had an ample factual basis for its decision, but his rulings are reversed only if "clearly erroneous" when he finds the facts?

A great degree of deference is also accorded to a trial judge's decision to grant or deny a new trial. Such trial court decisions were once regarded as entirely unreviewable. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940). However, *Gasperini*, 518 U.S. at 435-436, departed from common law tradition to allow an appellate court to review a trial judge's decision to deny a motion for a new trial. However, *Gasperini* also held that such a review of the facts, for purposes of deciding a motion for new trial, is constitutional only if the appeals court review is limited to an abuse of discretion standard. *Gasperini*, 518 U.S. at 434.

An appeals court's entering final judgment for a party whom a jury has found should lose is a far greater diminishment of the jury's prerogative than is the sustaining of a motion for a new trial. The sustaining of a motion for a new trial results only in another jury's deciding the case. On the other hand, judgment as a matter of law is a final decision awarding victory to the party which a jury, after hearing days of testimony, has decided should lose.

Gasperini held that an abuse of discretion standard is constitutionally required for an appeals court review of a trial judge's decision to deny a motion for a new trial. It follows that a "*de novo*" review of the greater intrusion on the jury's prerogative (the grant of a judgment as a matter of law) is

constitutionally impermissible.

A Rule 50 motion, unlike a Rule 56 motion, should not be reviewed *de novo*. It should be afforded a highly deferential review, just as are all other decisions of a district judge who views the witness. The same deference accorded the trial judge should also be accorded the jury. *See* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325, 328 (1995) (stating "[t]he marginalization of the jury undermines the democratic vision of full participation and may discourage citizen respect for the legal system in general").

The proper deference to be afforded a jury verdict was eloquently stated by the dissent in *Shipman*:

> This is no occasion for an old common-law lawyer to indulge in a panegyric on the virtues of jury trial; how in our fallible system of human justice it is the best instrument yet devised for the determination of the facts, how even its imperfections operate to rub the rough edges off the technical principals of law when they would result in unjust verdicts, how it is constantly improving with the progress of our jurisprudence and with the advance of education and enlightenment, how it gives a citizen a proud and rightful place in the administration of justice, and tends to make real our utopian dream of a single 'government of the people, by the people, and for the people.' There are many who do not agree with my almost reverential attitude toward jury trial, but this is no occasion for a debate on that subject, because our forefathers wrote into our Constitution the right of trial by jury in both criminal and civil cases.

411 F.2d at 387.

By independently reviewing the evidence adduced at trial, and weighing the credibility of the witness, the Court of Appeals seriously overstepped its role, in violation of the Seventh Amendment and the Federal Rules of Civil Procedure. When, as here, a properly-instructed jury has before it a *prima facie* case of discrimination, and where the parties have presented sharply conflicting evidence as to whether bias or some legitimate reason was the basis for the employer's decision being challenged as a violation of the federal anti-discrimination laws, it is the province of the jury, not the Court of Appeals, to weigh that conflicting evidence and to decide whether the motive was a permissible or unlawful one. Because the Court of Appeals clearly overstepped its proper function here, the decision below must be reversed.

CONCLUSION

The jury verdict should be reinstated.

Respectfully submitted,

JIM WAIDE
(Counsel of Record)
DAVID A. CHANDLER
VICTOR I. FLEITAS
Waide, Chandler & Fleitas, P.A.
P.O. Box 1357
Tupelo, MS 38802
(662) 842-7324

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167

ALAN B. MORRISON
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner

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No. 99-536

IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

TAYLOR B. SMITH
Counsel of Record
BERKLEY N. HUSKISON
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Post Office Box 1366
Columbus, MS 39703
(662) 328-2316

POPE S. MALLETTE
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Post Office Box 947
Oxford, MS 38655
(662) 234-4845

Attorneys for Respondent

157530

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Sanderson Plumbing Products, Inc., has no parent corporation and no publicly-held company owns ten percent (10%) or more of its stock.

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COUNTERSTATEMENT OF THE CASE

I. Background

Respondent, Sanderson Plumbing Products, Inc. (hereinafter "Respondent" or "Sanderson"), is a company involved in the manufacture of toilet seats and covers located in Columbus, Mississippi. (*3 R. 147; L-27*).[1] The Company has approximately 850 employees and at the time of the trial, the President of the Company was Sandra Sanderson. (*Id. at 89; L-23*). Petitioner, Roger Reeves, (hereinafter "Petitioner" or "Reeves") was a supervisor in a department of the Company known as the Hinge Room. (*Id. 147*; *L-27*). Reeves was terminated by Sandra Sanderson on October 23, 1995 for unsatisfactory work performance in his assigned job responsibilities, failure to follow company policy and procedures, and falsification of attendance records of employees under his supervision. (*Id. at 153-155; L-33-35*). Reeves filed suit in the United States District Court for the Northern District of Mississippi claiming that Sanderson terminated him because of his age in violation of *THE AGE DISCRIMINATION IN EMPLOYMENT ACT, (29 U.S.C. § 621, et seq.)*. (*3 R. 1*). The trial of this matter was held on September 8-12, 1997. At the conclusion of the testimony, the court overruled Sanderson's Motion for Judgment as a Matter of Law and submitted the matter to the Jury. The Jury returned a verdict in favor of Reeves and further found that the action of Sanderson was willful. Sanderson filed a timely Renewed Motion for Judgment as a Matter of Law and Reeves filed a Motion for Front Pay. On May 21, 1998, the district court entered an Opinion and Order overruling Sanderson's Renewed Motion for Judgment as a Matter of Law. (*3 R. 287-89*). Sanderson appealed to the United States Court of Appeals for the Fifth Circuit. In an Opinion rendered on April 22, 1999, the Court of Appeals found there was insufficient

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1. References to testimony are made to the Official Record by Volume and Page number; to the Joint Appendix as: J. App. ___; and to the Lodging Appendix supplied by Respondent as: L-1, L-2, etc.

evidence to submit the case to a jury.[2] Thereafter, Reeves filed a Petition for Rehearing *en banc*, which was denied by the Court of Appeals on June 9, 1999.

On or about September 15, 1999, Petitioner filed a Petition for Writ of Certiorari to this Honorable Court, which was granted on November 8, 1999.

II. Factual Background and Prior Job Performance

A. Factual Scenario

Reeves began employment with the predecessor company of Sanderson in 1955. When Ms. Sanderson took over operations of the predecessor company in 1984, Reeves was supervisor in a department of the Company known as the Hinge Room. (*3 R. 32; L-2*). The Hinge Room ran a regular line and a special line. (*Id. at 33; L-3*). Reeves was supervisor over the regular line and Joe Oswalt was supervisor over the special line. (*Id.*) Russell Caldwell was the Manager of the department and supervised both Reeves and Oswalt. (*Id.*). Reeves was terminated on October 23, 1995, for the reasons stated in the opening portion of this Brief. Reeves' immediate supervisor, Caldwell, who was 45 years of age, was terminated at the same time for the same reasons. (*3 R. 153-155; L-33-35*). Additionally, the evidence is uncontradicted that the third and other supervisor in the Hinge Room, Oswalt, approximately 33 years of age,[3] would have been terminated for the same reasons had he not quit work at Sanderson in August of 1995. (*4 R. 210-11; L-64-65*).

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2. The entire Opinion of the Fifth Circuit is found in the Joint Appendix (J. App. pp. 10-20).

3. Oswalt testified at the trial of this matter in September of 1997 that he was 35 years of age. At the time of the termination of Reeves in October of 1995, obviously, Oswalt would have been approximately 33 years of age. Various places in the Record and in the Opinion of the lower court refer to Oswalt being 35 years of age and, while this minor difference is not significant, Oswalt was approximately 33 years of age.

Sanderson had a union that represented the production and maintenance employees of the Company. The union contract included general work rules. (*Union Contract, Ex. D-7, 4 R. 188-189; L-42-43*).[4] Included in those rules was a paragraph dealing with attendance, which read as follows:

> Employees are expected to maintain a good attendance record. Time lost from work in excess of five percent (5%) of the scheduled hours in a month or lateness at the start of the work shift or returning from break in excess of two (2) occasions per month, will subject an employee to disciplinary action.

(*Ex. D-7 at p. 40; Id. at 188*).

The contract also stated that with regard to violations of the rules relative to attendance, progressive discipline would be handed down as follows:

First Offense: Verbal warning, with a written record being made of the warning;

Second Offense: A written warning;

Third Offense: Suspension for three (3) days; and

Fourth Offense: Discharge.

(*Ex. D-7 at p. 41; 4 R. 189; L-43*).

The purpose of the progressive steps is not only to have a record of infractions by an employee but also to enable the Company to be able to continually reinforce and attempt to rehabilitate an employee. (*Id. at 189-190; L-43-44*).[5] Reeves,

---

4. The Collective Bargaining Agreement is Ex. D-7 contained in the original Volume of exhibits in the Record.

5. As an example of the rule with respect to attendance, if a particular employee is excessively absent or tardy for four (4) straight

(Cont'd)

being a supervisor for a number of years, was well familiar with the attendance policy and the five percent (5%) rule and knew that there was a step procedure for disciplinary action when employees violated the rule. (*3 R. 38; L-7*). Reeves readily acknowledged that one of his functions as a supervisor was to make sure the people under his supervision (around 35 employees) were at work and on time. (*Id. at 36; L-5*). He further recognized that he was required to note any absences or tardiness of employees under his control. (*3 R. 38-39; L-7-8*). Reeves admitted at trial that Sanderson placed great emphasis on being present and timely at work. (*Id. at 36; L-5*). Moreover, he agreed that Sanderson had continuously attempted to emphasize this matter not only to rank-and-file employees but also to supervisors. (*Id.*).

Timesheets were important because they were not only the record of an employee's time worked to allow accurate pay of employees, but were also very important to monitor the employee's attendance and tardiness so that equal implementation of the step procedures for disciplinary action could be effected. In fact, the timesheets contained a particular code that explained why a person was tardy or absent. Thus, it is critical to Sanderson that a supervisor keep accurate attendance and tardiness records on a daily, weekly and monthly basis to ascertain where employees stand in the step procedure. This was the responsibility of the supervisor of every department. Supervisors received daily timesheets, which they checked off and approved regarding an employee's attendance. If the employee was present, the supervisor noted whether the

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(Cont'd)
months and the same is properly noted, then it would take four (4) months before the employee would complete the steps and be discharged. Thus, the employee would have that period to rehabilitate himself. (*4 R 190; L-44*). The applicable portion of the Contract further provided that after disciplinary action has been issued and has been in an employee's file for 12 months, it will not be considered. (*Ex. D-7 at p. 42*).

employee was tardy, and if the employee was absent and/or tardy, the reason was noted. (*3 R. 39, 43; L-8, 12; 4 R. 191; L-45*).

It was, therefore, critically important that timesheets be correctly maintained by supervisors such as Reeves. (*4 R. 192; L-46*). Additionally, if an employee who was not supposed to be at work until 7:00 a.m.[6] clocked in at 6:30 a.m., but ate breakfast in the break room before going to work at 7:00 a.m., that employee would be paid improperly for thirty (30) minutes that he/she did not work unless the supervisor made a notation of this on the daily timesheet. (*4 R. 192; L-46*). If for some reason the employee actually worked longer than the clock showed, it was the function of the supervisor to make that notation. Again, all such corrections or adjustments were the responsibility of supervisors such as Reeves. (*Id. 192-193; L-46-47*).

Reeves readily admitted, as an example, that if an employee who is supposed to be at work at 7:00 a.m. does not clock in until 7:00 a.m. or does not come into work until after 7:00 a.m., then he is required to make a notation on the daily timesheet to indicate that the person was absent and/or tardy so that information would be recorded on the weekly and monthly reports. Reeves further admitted that after the daily timesheet, as aforementioned, he would then receive a weekly report listing each employee's hours worked each day that week, and he was to review the report for accuracy and correct any errors resulting from the daily timesheets. He would then give the weekly report to his supervisor, Russell Caldwell, who would also review it. It was then sent to data processing. (*3 R. 39-40; L-8-9*). Although checked by Caldwell, Reeves admitted he was the first one who would receive the weekly reports and it was his duty and responsibility to review them. (*Id. at 40; L-9*). A report was generated weekly and then monthly showing each employee's attendance. (*Id. at 39; L-8*).

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6. The normal starting time for most employees was 7:00 a.m. (*3 R. 39; L-8*).

Reeves was likewise familiar with the monthly reports and on a monthly basis his department received a monthly report of each employee showing how many days the employee had been absent or tardy, the reasons for same, and a percentage related to total attendance. (*3 R. 41; L-10*). He contends that there is "evidence of pretext" because he had no involvement with the monthly report from which write-ups were given, as that was the responsibility of Russell Caldwell. (*Br. of Pet. at pp. 12, 43, n.26(a)*). A review of the uncontradicted evidence reveals otherwise. After testifying as to his responsibility to fill out the daily reports, Reeves admitted he was the one who received the weekly report to check and make sure there were no errors because of his daily records. (*3 R. 40; L-9*). Obviously, the monthly report was based upon the daily and weekly reports compiled by Reeves. Even then, Reeves, contrary to the assertion in his Brief, admitted that when the monthly reports came out, he reviewed them with Caldwell. (*Id. at 42; L-11*). He admitted there were occasions when employees would improperly clock in and it would be his responsibility to correct the time records. (*Id. at 39-40; L-8-9*). Reeves readily admitted the importance of correctly maintaining the daily, weekly and monthly records and further admitted, for example, that if an employee was absent or tardy and this was not reported by the supervisor, then that employee would not be disciplined, whereas if another employee was also absent or tardy and was reported and written up, that employee would be disciplined and this would result in unequal treatment between the two employees. (*Id. at 43; L-12*).

The weekly time records were introduced into evidence as Ex. D-3. (*Id. at 116*). At the end of the month, a monthly absentee report was generated showing a summary of time lost within the month (dependent, of course, upon correct reporting by the supervisor). In other words, if at the end of the month, an employee was absent one percent (1%) or eight percent (8%) during the scheduled hours, this would be reflected. (*An example of this document is that introduced as Ex. D-4 — contained in the original Exhibit file*) (*4 R. 195-96; L-49-50*).

B. 1993 Performance Problems of Plaintiff

Problems in the Hinge Room began to surface as early as the fall of 1993.[7] At that time, Powe Chesnut, who was then Director of Quality Control at Sanderson, conducted a review of the entire operating procedures in the Hinge Room in an effort to improve productivity and determine quality and quantity problems in the department. (*Id. at 197; L-51*). The study revealed that supervision in the Hinge Room on the assembly line supervised by Reeves was very lax inasmuch as people were not following general work rules, employees were late returning from break, and employees were taking unscheduled breaks. (*Id. at 198; L-52*).

As a result of the findings, in December of 1993 Reeves was placed on probation by his immediate supervisor, Russell Caldwell, and then Director of Manufacturing, Everett Livingston (who died before trial) for unsatisfactory work performance that included, among other things, not counseling or writing up employees for tardiness and not following absentee policies. (*Id. at 198-199; L-52-53*). As memorialized by memo dated December 13, 1993, from Russell Caldwell to Roger Reeves placing Reeves on probation, supervision in the department was weak and needed substantial improvement, and lack of leadership shown by Reeves was a major problem in the department. (*December 13, 1993 Memo contained in Personnel File of Reeves at Ex. P-1 - last page of Ex. P-1, 3 R. 28*).[8]

7. Sanderson performed an audit of the Hinge Room in 1991. In 1991, the Quality Control Department, which is empowered to do such studies, ran the regular line in the Hinge Room for six (6) months. (*4 R. 196; L-50*). To improve efficiency, the QC Department developed a Standard Operating Procedures Manual, which was given to Russell Caldwell and Roger Reeves for future use. (*Id. at 197; L-51*). Many of the same problems that occurred in 1991 surfaced again in the 1993 study. (*Id. at 198; L-52*).

8. Though at the trial Reeves attempted to castigate Powe Chesnut as evil, at this time in 1993 Chesnut had no direct authority over Reeves

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Petitioner contends there is some "confusion" as to whether or not Reeves was placed on probation in 1993 by Chesnut. (*Br. of Pet. at p. 10*). There is no confusion in the Record. The Record is clear that in 1993, Reeves was put on probation by Russell Caldwell and then Director of Manufacturing (*predecessor to Chesnut*), Everett Livingston. (*4 R. 199; L-53*). While Reeves claims there was a contrary affidavit submitted by Chesnut, a review of the Record reveals without contradiction that Chesnut did not put Reeves on probation in 1993 but simply made a recommendation — indeed, as Director of Quality Control, it was his responsibility to make such recommendations. Even then, he testified he made many recommendations that were not followed. (*Id. at 237*).

C. Events Leading to Termination of Petitioner

In the summer of 1995, problems and complaints again surfaced in the Hinge Room. (*Id. at 203-204; L-57-58*). Chesnut, who became Director of Manufacturing in January of 1995 (*4 R. 201; L-55*), was informed by Hinge Room Manager Caldwell that he was unable to meet production because of constant absenteeism and tardiness of employees within the department. (*Id. at 203; L-57*). Chesnut had daily 7:30 a.m. meetings with supervisors where they discussed the schedule, production, and things of that nature. (*Id. at 202; L-56*). Although Caldwell complained of absenteeism and tardiness, records under the control of Caldwell and Reeves utilized by Sanderson to detect such problems failed to reflect the same. (*Id. at 204; L-58*). For example, monthly absentee reports did

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or his supervisor, Russell Caldwell. (*4 R. 198; L-52*). Moreover, Chesnut was not involved in placing Reeves on probation and after he was placed on probation, and after Chesnut became the Director of Manufacturing, Chesnut gave Reeves a wage increase when Reeves was 55 years old! (*3 R. 65; L-18*). This is very important as one recognizes that the only evidence Reeves had of alleged age discrimination was an alleged statement made by the same person who gave him the raise — Powe Chesnut.

not show these particular problems with attendance, as few employees were shown as late or exceeding the 5% absence rule. This led Chesnut to believe that something was wrong in reporting procedures, and accordingly, he requested an audit of the timesheets. (*Id. at 203-204; L-57-58*).

In late September or early October of 1995, Chesnut requested that Lucille Reeves, who was and is presently in the position of Manager of Quality Control, review records relative to attendance and tardiness in the Hinge Room. (*Id. at 204; L-58*). As part of her investigation, L. Reeves reviewed the weekly timesheets and monthly absentee reports for the months of July, August, and September of 1995. (*Id. at 205-206, 275-276; L-59-60; Weekly Reports, Ex. D-3; Monthly Reports, Ex. D-4; Id. at 275-279; L-79-83*).[9] After completing a review of the documents, L. Reeves prepared a summary report. (*Id. at 277; L-81; Ex. D-5; 3 R. 146; J. App. pp. 21-29*). As noted in the summary, there were numerous errors and omissions on the part of Reeves, Oswalt and their immediate supervisor, Russell Caldwell.[10] Ms. Reeves identified Ex. D-5(a) (*3 R. 146;*

9. L. Reeves was initially requested to review only September records but after finding so many errors and miscoding instances, she was then requested to go back and do a study of the two previous months as well. (*4 R. 205; L-59*).

10. Although counsel for Reeves contended that the errors (Reeves never denied the errors were committed) were insignificant and/or fabricated, Reeves' counsel readily admitted that the same types of errors made by Oswalt (foreman of the special line) as committed by Reeves were present. Counsel stated, "Then the other people who are listed as employees of the special line, I concede there are numerous violations". (*4 R. 294; L-93*). This is a very telling admission, and is one of many reasons why this case should not have been submitted to the jury! *Although Petitioner contends (Br. of Pet. at p. 5) there were "alleged occurrences" or that no problem of absenteeism was identified (Br. of Pet. at p. 44, n. 26(b)) —Petitioner's own counsel has admitted that the errors committed by the 33-year-old Oswalt (as shown in Ex. D-5) were almost identical to those committed by Petitioner and were sufficient to constitute termination!*

J. App. pp. 30-37), which she prepared from her original summary - Ex. D-5 - and set forth the problem in terms that a non-manufacturing person could understand. (*4 R. 277-278; L-81-82*).[11] As to Reeves, errors and misrepresentations were found on 12 different employees out of only 35 employees under his supervision. (*See Ex. D-5(a)*).[12] Reeves and Caldwell were responsible for employee absentee and tardiness records for the regular line in the Hinge Room. They failed to properly note and reflect that employees were absent or tardy which allowed employees to bypass disciplinary actions. (*3 R. 127-128; L-25-26; 4 R. 205-206; L-59-60*). Furthermore, there were several instances where time records were misrepresented or wrongfully adjusted, resulting in overpayment. (*3 R. 127-128; L-25-26*).[13] There were also errors made that prejudiced employees, as being incorrectly marked absent. (*4 R. 285-294; L-85-93*).[14] Reeves readily admitted that he made many errors

11. Ex. D-5 sets forth the numerous errors committed by both Reeves and Oswalt. For purposes of demonstrating just the Petitioner's errors, Ex. D-5(a) was prepared, which only listed errors committed by Reeves.

12. As shown in Ex. D-5, there were errors with respect to employees in the regular line of the Hinge Room supervised by Reeves, as well as the special line supervised by Oswalt. Importantly, Oswalt voluntarily left Sanderson in August of 1995. (*3 R. 77*). At the time these records were reviewed in the fall of 1995, if Oswalt had still been employed at Sanderson, he likewise would have been terminated along with Reeves and Caldwell. (*4 R. 210-211; L-64-65*).

13. The time records reflect that Reeves, Oswalt, and Caldwell continuously misrepresented or wrongfully adjusted employee absences and tardiness. Their actions resulted in disparate application and enforcement of Sanderson rules. (*4 R. 206; L-60*). Such unequal treatment of similarly situated employees could very well result in numerous grievance and arbitration cases with the union. (*Id.*).

14. The Court can readily see from a review of Ex. D-5 and D-5(a) the numerous errors and omissions on the part of Reeves, Oswalt and

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on time records, but claimed that the errors did not warrant dismissal. (*3 R. 51, 61; L-13, 17*).[15]

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Caldwell. The errors and misrepresentations as to employees Marcella Hogan and D. C. Mitchell were particularly troubling. As shown in the exhibits, not only were there errors as to tardiness, but Hogan was marked absent on July 21, 1995, when he was actually present; on July 28, 1995 the timesheets showed that this employee was sent home early (a devise which would not count against him on his absentee policy) even though the entire line ran that day and thus, there was no way this employee would have been sent home. (*Ex. D-5(a) at J. App. p. 32*). Thus, Reeves' comments on p. 44 of his Brief at n. 26(b) are not supported by the Record but, indeed, the Record shows just the opposite!

D. C. Mitchell, a Unit Leader who was often tardy, was supposed to report to work at 6:00 a.m. Yet, Ex. D-5 and D-5(a) reveal numerous instances of Mitchell coming in at times like 6:21 a.m., 6:30 a.m., 6:40 a.m., 6:48 a.m., etc. However, Mitchell was never marked or written up for this tardiness and apparently was paid as if he were on time. (*Ex. D-5(a), J. App. pp. 30-37; 4 R. 288-89; L-87-88*). This uncontradicted evidence of errors on the part of Reeves is most noteworthy when we recall that Reeves now argues that his only "error" was the failure to "assign a tardy code ["01"] to employees who clocked in at 7:00 a.m.". (*Br. of Pet. at pp. 6, 44, n. 26(c)*). Of course, it is also interesting that this in and of itself is a violation, because if an employee clocked in at 7:00 a.m., he/she could not be at work on the assembly line, and yet Petitioner now (*contrary to his trial testimony*) would have us believe that he did not make errors!

15. Reeves on rebuttal attempted to recant much of his testimony but his testimony was revealing. Though, for instance, he initially denied the testimony of company witnesses that an employee named D. C. Mitchell was to come in at 6:00 a.m. (he said this man was supposed to come in at 7:00 a.m.), yet, accepting Reeves' testimony that Mitchell was to come in at 7:00 a.m. as true, we then note from a review of the Record that when Mitchell was punching in at 6:15 a.m., 6:21 a.m., 6:27 a.m., 6:30 a.m., 6:40 a.m., 6:48 a.m., etc., Reeves was not making the necessary corrections in the records and, according to his own testimony, was allowing Mitchell to be paid for periods of time when he was not working! (*4 R. 336; L-19*). Thus, either Reeves was

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Upon receipt of the results of the investigation, Chesnut discussed the matter with Tom Whitaker, Vice President of Operations, and both decided that the problem was of such magnitude that they "needed to take it to Dana Jester, who was Vice President of our Human Resources." (*4 R. 208-09; L-62-63*). Jester independently reviewed the time sheets and the personnel files of the employees in question. (*Id. at 208, 314; L-63, 100*). Jester personally reviewed all of the information, including the source documents (timesheets), to see if they had been marked correctly. (*Id. at 314; L-100*). His review confirmed that there had been numerous instances where time had not been recorded correctly and where disciplinary action was not taken. (*4 R. 314*).[16] Chesnut, Whitaker and Jester

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improperly allowing Mitchell to be paid prior to his starting time or, if we accept the testimony of company witnesses that as a Unit Leader, Mitchell was required to come in at 6:00 a.m., then we find that Mitchell was clocking in well past 6:00 a.m. (6:21 a.m., 6:30 a.m., 6:40 a.m., 6:48 a.m., etc.) but yet Mitchell was never written up for his tardiness and apparently was paid as if he were on time.

In his deposition, Reeves testified quite clearly he did not remember an employee named Marcella Hogan; yet, on rebuttal he attempted to say he sent Hogan home because he was sick. He admitted his deposition testimony was contradictory but stated that he changed his testimony after reviewing the records sent to him by "the lawyers," which caused him to remember things differently. This is interesting, as Reeves also testified on direct examination that he was unable to read! (*4 R. 338; L-20; — prior testimony of being unable to read at 3 R. 42, L-11, 46*).

16. Jester, who was Vice President of Human Resources during the timeframe in question, was no longer an employee of Sanderson at the time of the trial. (*4 R. 312; L-98*). He reviewed the weekly time reports. (*Ex. D-3; Id. 313; L-99*). He also reviewed the monthly absentee reports. (*Ex. D-4; Id. 313-314; L-95-100*). After reviewing the study, Jester's response was "I was shocked. I found there were numerous instances where the time had not been recorded correctly and where disciplinary action where it was indicated had not been taken." (Cont'd)

all recommended dismissal of Reeves and Caldwell to the Company's President, Sandra Sanderson. (*3 R. 151-52; L-31-32; 4 R. 209-210, L-63-64, 314-315, L-100-101*).[17]

After review and discussion of the matter, President Sandra Sanderson made the final decision and terminated both Reeves and Caldwell. (*3 R. 151; L-31; 4 R. 209; L-63*).

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(*Id. at 314; L-100*). On cross-examination, Jester pointed out that if there was a clock-in time of 7:00 a.m., that meant the person was late and if the supervisor would code it as 01, that would show up on the report that would be sent into data processing as late and then it would come out on the weekly report. However, if it was not properly coded, it would not show up on the report and that would be the error. (*Id. at 318-319; L-103-104*). Jester, who was not involved in this study, gave further examples of the errors made by Plaintiff on Ex. D-5. (*Id. at 319-320; L-104-105*). As a matter of fact, he pointed out that one particular employee, Melvin Brownlee, was not shown to be late at any time and as Jester said, "That's right. That's the point. If this had been coded 01, this showed up right here." (*Ex. D-4; Id. at 320; L-105*). In other words, when an employee was late, it would not show up on the records as being late if the supervisor did not record it as an 01 or as being late — since the supervisor didn't code it properly on the daily timesheets, then obviously, there was no showing on the weekly or monthly reports that the person was late or absent. (*Id. at 320-321; L-105-106*). As Jester explained, it is not the weekly reports but the daily timesheets that had to be coded properly (the responsibility of Reeves) and obviously, if these absentees and tardies did not show up on the weekly reports, this meant that the supervisor had not coded it on the daily timesheets. (*Id. at 321; L-106*).

17. Jester was 56 years old when he made the recommendation — approximately the same age as Reeves. (*Id. at 315; L-101*). Further, the decision to recommend termination of both Reeves and Caldwell was extremely difficult for Jester because of Reeves' many years of service and because Caldwell's wife worked for Jester in Human Resources. However, it was his opinion that this was a decision that needed to be made. (*4 R. 315; L-101*). As Jester stated, age had nothing to do with it and his recommendation "was based strictly on job performance." (*Id.*)

D. Respondent's Managerial and Employee Complement

At the time of Reeves' termination there was one manager who was 68 years old, one manager who was 62 or older, two people who had previously retired from the Company at age 65 in managerial positions and had since returned, one being 72 and the other in the late sixties. There were 20 management people over the age of 50, 12 between the ages of 45 to 49 and numerous managers over the age of 60. (*3 R. 155-156; L-35-36*). This, of course, is significant factual documentation that Reeves repeatedly neglects to mention. Indeed, Petitioner even boldly (*and with absolutely no factual support*) makes an assertion concerning the fact that Respondent prefers "younger employees to an older one". (*Br. of Pet. at p. 28*). As aforestated, the very opposite exists!

III. The Decision to Terminate

As aforementioned, the President of the Company, Sandra Sanderson, made the final decision and terminated both Reeves and Caldwell. (*Id. at 151; L-31; 4 R. 209; L-63*).[18]

Ms. Sanderson was somewhat concerned initially because the Company was in violation of the union contract for failure to properly discipline certain employees in the department for violation of the attendance policy. (*3 R. 127-128; L-25-26*). Ms. Sanderson was 54 years of age when she made the decision to dismiss both Reeves and Caldwell. (*Id. at 152*). When Ms. Sanderson was asked if the decision to terminate Reeves was related to his age, she emphatically stated, "absolutely not". (*Id. at 152-153; L-32-33*). Her response was as follows:

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18. Although Chesnut, Whitaker, and Jester each independently recommended termination — after their independent reviews of the records, the decision to terminate was in the hands of Sandra Sanderson. Thus, there was only one decisionmaker. Giving the Petitioner more than the benefit of the doubt, his "culprit" in the picture, Chesnut, would at most have been only one of three who recommended termination to Ms. Sanderson.

> When a person manages a company or a department, they have to depend on lower management to do their job. In essence, you have to trust people . . .
>
> This termination was especially difficult because I've known of Roger Reeves since I came to town in 1969. And, of course, I worked with him rather closely sometimes from 1984 until he was terminated. I spent a lot of time on the line talking to Roger Reeves. I think I know Roger quite well. Mr. Caldwell has not been with the company long, but he's a very likeable person. His wife is also employed by our Human Resources Department, and she's a very valuable employee. So that also, you know, I had to think about that too.
>
> But the fact remained we had evidence or evidence was presented to me that in my opinion Mr. Reeves, Roger, had not done his job properly. He had not coded employees properly so that they could be disciplined according to our union contract. This can cause us a problem if we could have a grievance or an unfair labor practice. In one department, if you don't discipline people per the contract and you do in another department.
>
> . . . I trusted that everyone was doing the time sheets correctly. And they were going to data processing, not once but many times. And Roger has heard me, and so has Russell and everyone in that company, stress Sanderson's consistency in your disciplinary actions and accuracy on your payroll numbers. Do the daily time sheets.
>
> So, it was a difficult decision. You never want to lose a long-term employee. You lose experience, you lose knowledge. It's a loss to the company. But a superior or manager or director has to set an example

> for the employees that they supervise . . . Management has to present an example. They have to be the example and the leader to follow.
>
> So, faced with what was presented to me, I decided that this was justifiable grounds for termination, not only for one who did not code it correct, who did not properly administer the payroll records, but also for his manager who approved his actions. No, I didn't want to do it. And sitting here today, you know, I wish I weren't sitting here, but I honestly feel like I did the right thing. And I feel like if anyone in my position and anyone in another company falsified company records it's grounds for termination. But age had nothing to do with it.

(3 R. 153-155; L-33-35).

IV. Reeves' "Evidence" of Age Discrimination

Out of 379 pages of trial testimony, Petitioner's only "evidence" of age discrimination (and thus, his only showing of "pretext for discrimination") consists of two alleged comments attributed to Powe Chesnut. Petitioner testified in this regard as follows:

> One comment he made I was so old I must have come over on the Mayflower. Another one, I was working on a machine, walked up to me, I couldn't get it running, told me I was too damn old to do my job.

(*Id. 26; L-1*).[19]

19. At trial, Reeves admitted that the reference to the Mayflower was only said to him one time, and he does not remember when. (*3 R. 59; L-15*). In his deposition, he never mentioned that Chesnut had informed him that he was too old to do the job, but alleged only that Chesnut mentioned that he must have come over on the Mayflower.

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According to Petitioner's own testimony, these two statements were made to him "about two months before I was dismissed". (*3 R. 26; L-1, 15*).

Chesnut denied making the statement with reference to Petitioner being "too old for the job" and denied making any comment relative to "the Mayflower". (*4 R. 215-216; L-69-70*). It is significant and uncontradicted that nicknames were frequently used and that, for instance, Chesnut was referred to as the "walking boss". Moreover, there was an employee who worked on the regular line (where Reeves was supervisor) for many years who was referred to as "the old man." In fact, Roger Reeves referred to this employee (John Williams) as the old man. (*Id. at 215, 280; L-69, 84*).[20] Indeed, at Sanderson Plumbing, there are many people who retired and who came back to work on a part-time basis. Many of them are referred to as the old man. (*Id. at 216; L-70*). One employee named Clyde Cook retired when he was 62 years of age but returned and continues to work at Sanderson. He is now 73 and is often referred to by employees as the old man. (*Id. at 216; L-70*).

Lucille Reeves, who was not involved in either the recommendation to terminate or the termination, stated that the Company is known for its nicknames. Her name is Lucille but her nickname is "Sill" and she noted that a Manager there is referred to as "Snake". She pointed out their Personnel Manager is referred to as "that woman". (*Id. at 280; L-84*).

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When Reeves was asked at his deposition if there was any other statement made to him, he responded, "I don't know of anything else." Indeed, at trial Reeves admitted this was true. (*3 R. 60-61; L-16-17*). Reeves never explained this obvious discrepancy in his testimony — made under oath on both occasions.

20. After Chesnut and Lucille Reeves testified, Petitioner took the stand on rebuttal but never denied referring to Mr. Williams as "the old man" — yet, Reeves now attributes much significance to the alleged statements of Chesnut, who was not the person who terminated him.

Mrs. Sanderson, the person who terminated Petitioner, had no information as to whether Chesnut ever made such a statement to Reeves (*3 R. 160; L-38*) because frankly that was not a factor in her decision. (*Id. at 152-153; L-32-33*).

V. The Decision of the Court of Appeals

The Fifth Circuit held that once an employer articulates a legitimate, non-discriminatory reason "then the presumption of discrimination fades, and the plaintiff must prove that the employer's articulated reason is a pretext for unlawful discrimination". (*J. App. pp. 15-16*). In analyzing the requirements of establishing pretext, the Fifth Circuit stated in part as follows:

> . . . [T]o establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decisionmaking process. Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to the employment decision. Mere "stray remarks" — *i.e.*, comments which are "vague and remote in time" — however, are insufficient to establish discrimination.

J. App. p. 16.

The Fifth Circuit opined further, "the important inquiry is whether plaintiff had produced sufficient evidence for a jury to find that discrimination has occurred". (*J. App. p. 16, n.17*, citing authority). The Fifth Circuit pointed out that the only way (*which is extremely significant*) Petitioner attempted to cast suspicion on Sanderson's proffered explanation was his testimony that at the time he was discharged, he was only told about errors related

to one employee. (*J. App. p. 17*). The court held quite clearly that while this was disputed, nevertheless, this alleged "inconsistency" could hardly be considered "mendacious". (*J. App. p. 18*). The court correctly found that "Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves' work performance was unsatisfactory". (*J. App. p. 18*).

The Fifth Circuit determined that an essential final step was to determine "whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision". (*J. App. p. 19*). The court correctly noted that the alleged age comments of Chesnut "were not made in the direct context of Reeves' termination". Furthermore, the court recognized that Chesnut was just one of three (3) individuals who recommended to Mrs. Sanderson that Reeves be terminated and there was no evidence to suggest that any of the other decisionmakers were motivated by age. (*J. App. p. 20*). As part of this last statement, the court also found it significant that each of the three (3) Hinge Room supervisors were accused of inadequate record-keeping, including not only Petitioner and Caldwell but the younger Oswalt as well. (*J. App. p. 20*). Thus, the court concluded that Reeves did not "introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA". (*J. App. p. 20*).

SUMMARY OF ARGUMENT

Petitioner's argument is: (1) Petitioner need only show there is some question as to whether or not the legitimate, non-discriminatory reason proffered by Respondent was true to enable the jury to resolve whether Respondent is guilty of age discrimination; and (2) that in such a case, when considering a Motion for Judgment as a matter of law (Rule 50), the court should only consider Petitioner's evidence and/or the uncontradicted evidence.

Since Reeves alleges age discrimination, mere dislike or disbelief of Sanderson's decision without countervailing evidence, as opposed to speculation, surmise and conjecture, that Sanderson's reason was not the true reason for discharge should not allow the courts or a jury to second-guess the wisdom or soundness of a business decision. To require more than "disbelief" of an employer's proffered reason is essential in order to protect not only the rights of an employer but to require the plaintiff to submit evidence allegedly forming the basis of his or her discrimination claim. Here, contrary to the arguments of Petitioner and those filing *amici curiae* briefs on behalf of Petitioner, a review of the evidence reveals that Petitioner did not show that the reasons for the termination of Petitioner (*as well as that of Caldwell and what would have been the termination of Oswalt if he were still employed*) were false. What Petitioner demonstrated, however, was his subjective belief that the reasons were false — but such speculation, surmise, and conjecture will not take the place of evidence. Indeed, the cases cited hereinafter, including decisions of this very court (*cited by Petitioner in his Brief*) reject such an argument!

Petitioner argues for what he calls the "pretext only" rule. As shown hereinafter, numerous courts of appeal and this Court have held that to create a jury issue, the plaintiff must show *both* that the defendant's reason was false *and* that discrimination was the real reason. However, even if a "pretext only" rule is applied, Petitioner has absolutely no probative evidence that would warrant submitting this case to a jury. Under the "sufficiency of the evidence" test, as well as close scrutiny of the circuits supposedly employing the "pretext only" test, it is clear that when the evidence taken as a whole does not: (1) create a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer; and (2) create a reasonable inference that age was a determinative factor, then there is no issue to submit to a jury and in the proper exercise of its "gatekeeper" function, the trial court should not

allow the same to be submitted to the possible whims of jurors who may (*and probably will*) dislike the employment decision at issue.

Petitioner's argument relative to the Seventh Amendment standard is also misplaced and unsupported by the basic facts and law applicable to this case. For instance, employment discrimination cases rely upon the shifting burden of proof established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny and as shown hereinafter, analysis of all the evidence is mandated with reference to determination of not only a jury issue but the propriety of the action of a jury. Petitioner's own citation of authority supports the proposition that the Seventh Amendment does not deprive the federal courts of the power in a jury case to direct a verdict upon the ground of insufficiency of the evidence, with the essential requirement being that mere speculation is not sufficient and the standard of proof required for the submission of evidence to a jury is essentially one to be applied with reference to particular situations and particular types of cases. *See, e.g., Galloway v. United States*, 319 U.S. 372, 389, 395 (1943). (*Br. of Pet. at pp. 33, 36*). *See, also, Parklane Hosiery v. Shore*, 439 U.S. 322, 336-337 (1979) (the Seventh Amendment has never been interpreted in a rigid manner [*advocated by Reeves*] but on the contrary, many procedural devices developed since 1791 have diminished the civil jury's historic domain but yet found not to be inconsistent with the Seventh Amendment).

Moreover, and as shown hereinafter, it is submitted that every circuit subscribes to the well-accepted principle that in passing on a motion for a directed verdict, the courts consider all of the evidence in a light most favorable to the non-movant. *See pp. 38-40, infra.* By the same token, this Court has specifically approved such. *Whitley v. Albers*, 475 U.S. 312, 322 (1986) (in ruling on a motion for a directed verdict, court must consider all of the testimony, including conflicting expert testimony).

Although erroneous, Petitioner's argument that the correct standard under Rule 50 is that only the non-movant's evidence and/or the uncontradicted evidence should be considered leads to the same result reached by the Court of Appeals. Petitioner, under the clearly established law, may not rest upon surmise and suspicion as the basis for evidence and as will be clearly demonstrated hereinafter, even if one considers the Petitioner's evidence and/or the uncontradicted evidence, the following facts are established: (1) Petitioner committed errors and violations of his duties and responsibilities as a supervisor; (2) two others who committed the same violations were and/or would have been (if still employed) discharged for the same reason; (3) Petitioner's own counsel, in effect, admitted that the same infractions committed by Petitioner were committed by his co-foreman (the 33-year-old Oswalt) and that certainly the violations committed by Oswalt were grounds for discharge; (4) the alleged remarks of Chesnut, not the one who made the decision to terminate and only one of three who recommended termination, had no connection with the employment decision leading to the termination of Petitioner or the events leading up to the same; and (5) the use of the name "old man" was one admittedly used by Reeves in his own supervision of employees.

To hold as Petitioner requests in this case, the Court must abandon the standards set forth by this Court six (6) years ago in *Hicks* and negate a substantial body of law now entrenched in the circuits on issues as far ranging as an employer's right to engage in business judgment, absence of liability where the alleged discriminatory remarks are not causally connected to the employment decision in question and/or made by one without termination authority, and broader procedural rules whereby the appellate court is allowed to act as a "gatekeeper" to review the evidence as a whole in determining the propriety of a jury's decision.

ARGUMENT

I. PETITIONER ATTEMPTS TO SUBSTITUTE HIS OPINION OF CORRECT BUSINESS JUDGMENT FOR THAT OF RESPONDENT

Although never denying he committed errors — but disputing their significance, Reeves contends that he should not have been discharged and places great emphasis on the fact that, in his opinion, Director of Manufacturing Chesnut did not like him. Reeves overlooks the undisputed fact that dislike is not enough to prove pretext. All of the circuits have so held. *See, e.g.*, *Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1165-66 (5th Cir. 1993); *Grimes v. Tex. Dep't of Mental Health*, 102 F.3d 137, 143 (5th Cir. 1996); *Freeman v. Package Machine*, 865 F.2d 1331, 1341 (1st Cir. 1988) (claimant needs to show more than that his employer miscalculated in deciding that he had outlived his corporate usefulness; good-faith errors in an employer's business judgment are not the stuff of ADEA transgressions; claimant must show more than that the employer made an unwise business decision, or an unnecessary personnel move or acted arbitrarily or with ill will). Reeves further argues that since he does not agree with the decision, then the Jury should be allowed to determine whether it was appropriate. Other than turning the ADEA on its head and making it a "just cause" statute (which all of the courts have held is not appropriate, *see, e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 52 (1993); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1085 (6th Cir. 1994); *Walker v. Nationsbank of Fla.*, 53 F.3d 1548, 1558 (11th Cir. 1995); *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1506 n.6 (5th Cir. 1988)), Petitioner further implicitly requests this Court to overrule precedent accepted by all circuits that the ADEA was never intended to be a vehicle for judicial second-guessing of business decisions nor was it intended to transform the courts into personnel managers. *See, e.g., Turner v. North Am. Rubber, Inc.*, 979 F.2d 55, 60 (5th Cir. 1992); *Ross v. Univ. of Tex. San Antonio*, 139

F.3d 521, 527 (5th Cir. 1998); *Norton v. Sam's Club*, 145 F.3d 114, 119-120 (2d Cir. 1998) *cert. denied*, 525 U.S. 1001 (1998); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992); *Bell v. Gas Serv. Co.*, 778 F.2d 512, 515 (8th Cir. 1985); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

Indeed, other than claiming that the many errors that he admittedly made did not warrant dismissal and although having no explanation for the termination of his much-younger supervisor, Caldwell, or of the fact that his co-supervisor, the 33-year-old Oswalt, would have been terminated, he, nevertheless, contends that simply because he disagrees with the decision and because of two statements allegedly made to him months before his termination, that thus, the jury should be called upon to decide if his termination was because of age. This is not sufficient evidence for a jury determination. *See, e.g., Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 247 (6th Cir. 1997), *cert. denied*, 522 U.S. 967 (1997); *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Elrod*, 939 F.2d at 1470; *Turner*, 979 F.2d at 60.

II. THE ALLEGED REMARKS OF CHESNUT DO NOT CONSTITUTE EVIDENCE OF AGE DISCRIMINATION

Petitioner's alleged "evidence" consisting of the "stray remarks" attributed to Chesnut is misleading. All circuits agree that stray remarks, — *those that are* vague and remote in time, and not related to the employment decision in issue — are insufficient to establish discrimination. *See, e.g., Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1995) (statements must be proximate in time to the terminations and related to the employment decision at issue, otherwise, a stray remark);

Krystek v. Univ. of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999); *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434-35 (5th Cir. 1995); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1121-22 (7th Cir. 1998) (in order to raise a genuine issue of material fact to prove age discrimination, a defendant's comments on which plaintiff relies must be contemporaneous with and related to the firing, and made by the decisionmaker); *Shorter v. ICG Holdings*, 188 F.3d 1204, 1210 (10th Cir. 1999) (plaintiff must still show some nexus between the statements and the defendant's decision to terminate the employee); *Simmons v. OCE-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999) (absent a causal link between the racial comments and the adverse employment decision, statements by a decisionmaker, are best classified as unrelated to the decisional process and thus, not evidence of pretext); *see also Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456-57 (10th Cir. 1994) (isolated comments unrelated to the challenged action are insufficient to show discriminatory *animus* in termination decisions and plaintiff must demonstrate a nexus between the allegedly discriminatory statements and the defendant's decision to terminate — absent causal nexus between the statement and the action in question, the statement has no relevance); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (citing decisions of numerous other circuits that isolated comments unrelated to the challenged action do not demonstrate a sufficient nexus between the alleged discriminatory statement and the decision in question).

Furthermore, the circuits are in agreement that remarks attributed to someone who did not make the decision to terminate the Plaintiff or were isolated comments and were *the Plaintiff's only evidence of discrimination* are insufficient to constitute direct evidence or supply circumstantial evidence of discrimination. *See, e.g., Sreeram v. La. State Univ.*, 188 F.3d 314, 320 (5th Cir. 1999); *Turner v. North Am. Rubber, Inc., supra*, 979 F.2d at 59 (5th Cir. 1992); *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990); *Gagne v.*

Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989); *Hopkins v. Elec. Data Sys. Corp.*, 196 F.3d 655, 658, 662-663 (6th Cir. 1999); *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 254-55 (1st Cir. 1986); *Montagne v. Am. Convenience Prod.*, 750 F.2d 1405, 1412 (7th Cir. 1984); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980); *Walton v. McDonnell-Douglas Corp.*, 167 F.3d 423, 426 (8th Cir. 1999); *Mitchell v. USBI Company*, 186 F.3d 1352, 1355 (11th Cir. 1999); *Smith v. The Thresholds*, 1999 WL 410030, *7 (N.D.Ill. 1999); *Davidson v. Quorum Health Group, Inc.*, 1 F. Supp. 2d 1321, 1325 (N.D.Ala. 1997); *see also Price-Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring) (". . . [s]tray remarks in the workplace . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" do not constitute direct evidence of discrimination).

Thus, one comment by one of three who independently recommended dismissal to the ultimate decisionmaker that Petitioner "came over on the Mayflower" and another alleged comment, "I was too damn old to do my job" occurring some two months before dismissal and having no connection with the numerous *admitted* infractions committed by Petitioner, and his two counterparts in the department, obviously are in no way even "remotely" causally connected to the termination. As stated previously, these two alleged "stray remarks" cannot even bridge the circumstantial evidence requirement. Thus, there is not even a scintilla, much less an inference, which would enable Reeves to submit his dislike for the business judgment of Sanderson to the jury in an effort to persuade the jury to substitute it's decision for the proper business judgment of Sanderson. Certainly, it is incumbent at this point to recall that Reeves referred to employees as the "old man". *See, supra,* n.20 at p. 17.

Reeves cites a number of authorities, none of which bear on the issue *sub judice*. (*Br. of Pet. at p. 30, n. 21*). For instance, *Anderson v. Bessemer City*, 470 U.S. 564 (1985) is not dispositive inasmuch as there were five (5) members selected to choose the person for the position in question and the court found that the four (4) men on the committee were biased against petitioner because she was a woman. Here, there is uncontradicted testimony (the only contradiction being Petitioner's "belief" in opposition) that Ms. Sanderson was the sole decisionmaker. Thus, here there is no credibility issue as to the motive of the decisionmaker. Likewise, *Abrams v. Lightolier, Inc.*, 50 F.3d 1204 (3d Cir. 1995), is not pertinent because, in *Abrams*, the statement of a supervisor was introduced for the purpose of demonstrating the company's policy toward older workers. There is no company policy at issue here. Indeed, the overall statistics concerning the ages of supervisors at Sanderson would absolutely defeat any such inference of a policy of age discrimination. Further showing of the irrelevance of *Abrams* is demonstrated in *Williams v. Betz Lab.*, 1996 WL 114815 (E.D. Pa. 1996). Likewise, *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) is inapposite. In *Ercegovich*, there were allegations of "numerous" discriminatory comments by supervisors indicating "a cumulative, managerial attitude". Again, there is the exact opposite *sub judice* — Respondent's statistics negate this scenario. Furthermore, there is an allegation of two comments by *one* person and there has been no effort to show a "managerial attitude". Of further significance is the fact that, in *Ercegovich*, the statements were related to the employment action at issue. *Ercegovich* was further distinguished in *Hopkins v. Elec. Data Sys. Corp.*, *supra*, 196 F.3d at 663-664.

Similarly, *Woodson v. Scott Paper Co.*, 109 F.3d 913 (6th Cir. 1997), *cert. denied,* 522 U.S. 914 (1997) is irrelevant. The alleged remark present in that case was directly related to the issue of alleged retaliation against plaintiff for filing an administrative complaint against defendant. *Griffin v.*

Washington Convention Ctr., 142 F.3d 1308 (D.C. Cir. 1998) suffers the same malady. There the person allegedly making the statement in question was the "chief source" of information the company had to rely upon in evaluating plaintiff's job performance. Here, the opposite exists. Two other persons, Whitaker and Jester, each independently reviewed the numerous errors and infractions committed by Petitioner (as well as the errors committed by Caldwell and Oswalt) and recommended termination to the decisionmaker. Finally, *Kelley v. Airborne Freight Corp.*, 140 F.3d 335 (1st Cir. 1998), *cert. denied*, 525 U.S. 932 (1998) is of no comfort to Petitioner. The statements in question were directly related to adverse employment action involving the plaintiff and the statement that the employment action was "an excellent opportunity to get rid of some of the older mediocre managers" was actually made by the decisionmaker. *Id.* at 341.

III. The Rule Petitioner Denominates as "Pretext Plus" is the Appropriate Rule Envisioned in *St. Mary's Honor Ctr. v. Hicks*

Petitioner contends the Fifth Circuit employs a "pretext plus" test requiring that prior to submission of a case to the jury, there must be evidence both that the reason enunciated by the employer was false and that discrimination was the real reason. (*Br. of Pet. at pp. 16, 23*).[21] He then urges this Court to adopt the "pretext only" theory requiring only that a plaintiff introduce evidence that will cast doubt upon the reasons offered by the defendant to create a jury question. (*Id. at p. 22*). As shown hereinafter (Argument IV., *infra*), there is serious doubt

21. Petitioner denotes this as requiring "direct evidence" — as do arguments in some of the briefs of *amici curiae* submitted on behalf of Petitioner. However, this is a false prognostication as, indeed, a review of the decisions clearly shows that the circuits hold that such circumstantial evidence, rather than "direct evidence" may suffice to provide "pretext for discrimination" if it is sufficient "evidence". Such was not the case *sub judice*.

the Fifth Circuit employed such a "test" but, it is submitted the court was correct in its ruling regardless as to whether the "pretext plus" or the "pretext only" test is employed.

This Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) neither adopted a "pretext-plus" nor a "pretext-only" rule but simply requires proof of discrimination and held mere proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct". *Id.* at 524. *Hicks* teaches that one should not confuse pretext for discrimination with pretext in the more common sense. *Id.* at 515-516.

Once an employer articulates a legitimate, non-discriminatory reason then any presumption raised by the *prima facie* case drops and plaintiff must meet the ultimate burden of proving intentional discrimination. *Id.* at 507-08; and at 529 (Souter, J. dissenting). The burden of plaintiff to persuade the trier of fact that the defendant intentionally discriminated against the plaintiff merges with the ultimate burden of persuading the court that plaintiff has been the victim of intentional discrimination. *Hicks*, 509 U.S. at 507. This may not be accomplished by simply disproving the employer's asserted reason but rather there must be sufficient evidence of intentional discrimination. *Id.* at 514, 517. Indeed, in *Hicks*, the Court reminded that the ultimate question in a Title VII discrimination case is "discrimination *vel non*". *Id.* at 518. "*Vel non*" literally means "or not". BLACK'S LAW DICTIONARY 1555 (6TH ED. 1990). As *Hicks* teaches, "it is not enough . . . to disbelieve the employer" but rather a reason cannot be proved to be a pretext for discrimination unless it is shown "both that the reason was false and that discrimination was the real reason". *Hicks*, 509 U.S. at 515, 519).

Justice Souter in dissent argued that *Hicks* may be read to require the "more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient

to sustain judgment for the plaintiff". *Id.* at 535. But, in *Hicks*, the Court repeatedly re-emphasized that pretext means both casting doubt on the reasons given by the employer for the decision and showing (by proof) that discrimination was the real motivation, thus plainly contemplating two separate showings. The Court opined, "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination to the much different (and much lesser) finding that the employer's explanation of its action was not believable". *Id.* at 514-515.

Numerous courts of appeal have clearly followed the teaching in *Hicks* that it must be shown *both* that the reason was false *and* that discrimination was the real reason. *See, e.g.*, *Walton v. Bisco*, 119 F.3d 368, 370 (5th Cir. 1997); *Smith v. Stratus Computer Co.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Fagan v. New York State Elec. & Gas Corp.*, 186 F.3d 127, 132, 135 (2d Cir. 1999); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995); *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 959 n. 8 (5th Cir. 1993); *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 320 (5th Cir. 1999). The reasoning of these courts is legally and logically sound. To hold otherwise would be to turn discrimination statutes into "truth" statutes. However, falsity has never, in any area of the law, served as a proxy for the plaintiff's burden of proving the specific wrongdoing.

IV. In the Case *Sub Judice*, Regardless of the Alleged "Pretext Plus" or "Pretext Only" Rule, there was Insufficient Evidence to Submit to the Jury

Regardless of whether "pretext plus" or "pretext only" is embraced, Petitioner was not entitled to a jury determination. As an example, the seminal case of *Manzer*, *supra*, 29 F.3d at 1084, reveals the lack of merit to Petitioner's argument. The Sixth Circuit falls under the mantle of a "pretext only" circuit

and the significance of *Manzer* is that in showing pretext, the plaintiff is required to show by the preponderance of the evidence *either*:

> . . . (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge. . . . The first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, *i.e.*, that they are factually false. . . . The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttals are direct attacks on the credibility of the employer's proffered motivation for firing plaintiff and, if shown, provide an evidentiary basis for what the Supreme Court has termed a suspicion of mendacity. . . .
>
> The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal. . . . In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. . . .

Manzer, 29 F.3d at 1084.

Indeed, *Manzer* stated as follows that:

> If the bare bones elements of a plaintiff's *prima facie* case were sufficient to make this showing, however, the entire 'burden-shifting' analysis of *McDonnell-Douglas* and its successors would be illusory. No case could ever be culled out after the *prima facie* stage and every case would have to be determined by a jury. We do not believe that this was the intent of Congress or the outcome envisioned by the Supreme Court in its long line of cases implementing employment discrimination legislation. Accordingly, we hold that, in order to make this type of rebuttal showing, the plaintiff may not rely simply upon his *prima facie* evidence but must, instead, introduce additional evidence of age discrimination.

Id.

Other circuits referred to by Petitioner as "pretext only" circuits have adopted the same analysis as *Manzer* and each require some showing of discrimination. *See Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 983 (7th Cir. 1999). (Indirect evidence of pretext showing that an employer's proffered reasons are not credible may be made by demonstrating that the reasons are factually baseless, were not the actual motivation for the discharge, or were insufficient to motivate the discharge). Moreover, in *Pilditch v. Bd. of Educ. of City of Chicago*, 3 F.3d 1113 (7th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994), the Seventh Circuit stated that under *Hicks* a plaintiff "is left to unmask, if he can, the reasons proffered by the employer as fake. Beyond this, he must also prove that the true reason for his firing was discriminatory". *Id.* at 1117-1118. In addition, *Walker*, *supra*, 53 F.3d 1548, merely reinforces that the Eleventh Circuit follows the same analysis as in *Manzer*. *See Walker*, 53 F.3d at 1564-65 (Johnson, Senior Circuit Judge specially concurring). While *Walker* was criticized by a subsequent

Eleventh Circuit decision of *Combs v. Plantation Patterns*, *supra*, 106 F.3d 1519, a reading of *Combs* shows that the Eleventh Circuit followed the same analysis as relied upon and established in *Manzer*. *See Combs*, 106 F.3d at 1541-43. To be sure, in *Mitchell v. USBI Company*, the Eleventh Circuit recently reaffirmed that a reason cannot be proved to be a pretext for discrimination unless it is shown *both* that the reason was false *and* that discrimination was the real reason. *Mitchell*, 186 F.3d at 1355-56, (citing *Hicks*). Moreover, *Mitchell* held that even assuming the employer deviated from its policy, the deviation did not raise an inference of discrimination, as deviation from a company policy does not demonstrate discriminatory *animus* (citing other circuits). Thus, this "pretext only" analysis reinforces the action of the Court of Appeals in the case *sub judice*.

Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998), *rejected* the allegation of plaintiff that a fact-finder's rejection of the defendant's "proffered explanation" will always support an inference of discrimination and that in such case "no additional proof of discrimination is ever required" for the reason that "common sense compels us to reject so broad a reading". *Id.* at 1291. Thereafter, the court embarked upon a review of the "sufficiency of the evidence" concluding "the plaintiff's attack on the employer's explanation must always be assessed in light of the total circumstances of the case". *Id.* Thus, this pronouncement from a court Petitioner would denominate as "pretext only" clearly compels the conclusion that by making this same analysis *sub judice* (by review of the facts as previously set forth in this brief) the result is the same. Therefore, the result reached by the Fifth Circuit in its ruling was correct. Indeed, the Fifth Circuit subscribes to this same theory.

Indeed, in *Barbour v. Browner*, 181 F.3d 1342, 1346-47 (D.C. Cir. 1999), the court clearly revealed that under a "pretext only" analysis, the "casting into doubt" of only a part of the defendant's proffered explanation (as is the very most that can

be said for Petitioner's case *sub judice*), is insufficient to provide for a jury determination of the issue.

In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), the court held that a plaintiff can avoid judgment as a matter of law if the evidence taken as a whole: (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer; and (2) creates a reasonable inference that age was the determinative factor in the actions of which plaintiff complains. However, the employer would be entitled to judgment as a matter of law if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory. *Id.* at 994-95.

It is submitted that even under this theory espoused by Petitioner, the Court of Appeals *sub judice* was correct and, in fact, did not necessarily employ any other review of the evidence! Thus, using this standard (*Manzer* and its progeny), it is clear that Petitioner is entitled to no relief and the opinion of the Fifth Circuit was correct. For instance, with respect to Point 1 (that the proffered reasons had no basis in fact), there is no doubt and it is undisputed that not only Petitioner but the two other management employees in his department committed the infractions in question, which led to the discharge of Petitioner's supervisor and would have led to the discharge of the younger supervisor had he still been employed there. With respect to Point 2 (that the proffered reasons did not actually motivate his discharge), there is no evidence to the contrary. Indeed, the factual background relative to the termination of the younger supervisor over Petitioner, the fact that the 33-year-old supervisor would have been terminated had he still been employed, and Sanderson's statistics showing the numerous employees over 50 in supervisory positions clearly defeat any attempt of Petitioner to show that there was a factual issue that "the proffered reasons did not actually motivate his discharge". With respect to Point 3 (that the proffered reasons were insufficient to motivate discharge), obviously, there is no issue

here and Petitioner does not contend that the numerous errors made (*not only by Petitioner but his two colleagues in the department*) would have been and were insufficient to motivate discharge.[22]

Petitioner's evidence of pretext as set forth in his Brief does not constitute "pretext for discrimination" under any standard. (*Br. of Pet. at pp. 10-13*). For instance, contrary to Petitioner's statement in the Brief the following facts are undisputed: Reeves admitted he made errors; there is absolutely no confusion as to who placed Reeves on probation in 1993 just as there is no issue as to the fact that Chesnut gave Reeves a raise in 1995; not only has Reeves admitted he made errors (indeed, Ex. D-5(a) shows that out of approximately 35 employees under the supervision of Reeves, he made numerous errors involving 12 of those employees during this three-month study!) but, as shown, *supra*, n.14 at 10, Reeves made numerous errors on certain employees and on rebuttal clearly admitted that with respect to, as an example only, D.C. Mitchell, regardless of which direction he wanted to take as to when the employee was to report to work, Reeves did not properly document this employee's attendance (*i.e.*, either Mitchell was late but not marked tardy or he was improperly clocking in long before he was supposed to and being paid for not working!); Reeves admitted that he not only had the initial responsibility for the daily and weekly charting of attendance and time but also reviewed with his manager the monthly reports. Reeves' argument that he was the only supervisor disciplined is not only misplaced but also contradicted by the numerous records — the younger manager, Caldwell, was terminated — the 33-year-old Oswalt would have been terminated — and studies done by the Company in other departments concerning other

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22. In this regard, it is noteworthy to again recall that Reeves' own counsel, during examination, conceded that the identical violations committed in the same department by Petitioner's young, supervisor colleague (age 33) were "numerous violations". *4 R. 294.*

supervisors did not show discrepancies. *4 R. 270; L-74.*[23] Perhaps it is in order here to remember that the issue *always* is "pretext for discrimination" and that it is accepted, without dispute, that Reeves' subjective belief that, although he admitted many errors, Sanderson was not justified in dismissing him and his subjective belief only as to why he was dismissed, does not under any standard provide the necessary proof to create a jury issue as to age discrimination. *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 119 (5th Cir. 1993) (citing other cases to the effect that self-serving and speculative testimony regarding subjective belief that termination resulted from age discrimination is insufficient to make an issue for the jury); *Woythal, supra*, 112 F.3d at 247; *Elliott v. Group Medical & Surgical Serv., supra*, 714 F.2d at 564.

Perhaps it is also wise to recall as stated in *EEOC v. La. Office of Community Serv.*, 47 F.3d 1438, 1443-44 (5th Cir. 1995) that in determining "whether the employer's stated reason is false, the trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge". In other words and in line with the earlier authorities, "countervailing evidence" does not include "speculation, surmise, and conjecture".

23. Petitioner makes the assertion that since Oswalt left August 1, "this did not account for why the special line's claimed errors continued after July". (*Br. of Pet. at p. 14*). The obvious reason is undisputed in the Record — after Oswalt left on August 1, the Department Manager, Russell Caldwell, took over the responsibilities of Oswalt. *4 R. 206; L-60.* Thus, another reason why Caldwell was terminated!

V. Petitioner's Argument of Error by the Fifth Circuit in Considering All of The Evidence is Without Merit[24]

Petitioner submits a somewhat misleading argument and one shrouded in fundamental error. Petitioner contends that a court commits error by considering all of the evidence rather than just the evidence that supports the non-movant's case. *Br. of Pet. at p. 33.* This argument is, of course, fatally flawed. Initially, it is submitted that at this stage of any proceeding, the entire question is "sufficiency of the evidence". Again, the only question at this juncture is whether the court has "all the evidence it needs" (*Hicks*, 509 U.S. at 519), to determine whether or not "defendant intentionally discriminated against the plaintiff". *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

Even if Reeves was correct that only the evidence considered by Reeves and/or the uncontradicted evidence should be determinative, as shown hereinabove, there is absolutely no evidence of age discrimination.[25] Reeves' only evidence involves stray remarks, which do not supply the necessary showing of pretext that would warrant submitting the case to the jury. It is beyond question that "a mere scintilla of evidence is insufficient to present a question for the jury." *Rhodes v. Guiberson Oil*

24. This argument advanced by Petitioner was noted in the Response in Opposition to the Petition for Writ of Certiorari (Br. of Resp't at p. 18) to raise an issue not raised in the Court of Appeals. Additionally, Petitioner raised for the first time in his Brief on the merits questions relative to the Seventh Amendment and the standard of review under Rule 50 as opposed to the standard under Rule 56 of the Fed. R. Civ. Proc. Again, none of these issues is properly before this Court but, notwithstanding such, Respondent will subsequently address Petitioner's arguments.

25. Again, Petitioner seems to lose sight of the fact that his Complaint was based upon age discrimination and logically, to prevail, there must be evidence from which the fact-finder can determine that the adverse action resulted from the discrimination prohibited — here, age. Your Honors so held in *Aikens*, 460 U.S. at 715.

Tools, 75 F.3d at 993; *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (citing additional authorities). Indeed, subsequent to *Rhodes*, the Fifth Circuit again, relying upon *Rhodes,* ratified the universal rule that at the stage of the proceeding where all the evidence is submitted, the test is "sufficiency of evidence" a[illegible]hat the question as to whether there is evidence such as to permit the matter to be submitted to a jury depends upon whether or not the "evidence taken as a whole: (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer; and (2) creates a reasonable inference that age was a determinative factor in the actions of which the plaintiff complains". Otherwise, the employer would be entitled to judgment as a matter of law if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory. *EEOC v. Texas Instruments, Inc.*, *supra*, 100 F.3d at 1180.

As stated previously, this Court in *Whitley v. Albers*, 475 U.S. at 322-323, stated quite clearly that in ruling on a motion for a directed verdict all of the evidence must be reviewed to determine whether there was sufficient evidence to create a jury issue and this included not only all of the lay evidence but even consideration of "conflicting expert testimony". Thus, clearly, Petitioner's argument in this regard is clearly misplaced and unsupported.

For many years, the Fifth Circuit and practically all the other circuits have applied what in effect is the standard approved in *Whitley*, as above stated. In *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*) overruled on other grounds *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), the Fifth Circuit set forth the universal standard:

> On motions for directed verdict and for judgment notwithstanding the verdict, the court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper.

Boeing Co., 411 F.2d at 374.

As is shown in the cases cited below, the circuits have considered all of the evidence in a light most favorable to non-movant and with all reasonable inferences most favorable to the non-movant when considering a motion for judgment as a matter of law or judgment notwithstanding the verdict. *See, e.g., Silva v. Worden*, 130 F.3d 26, 30 (1st Cir. 1997) (court will consider all evidence offered during trial, including evidence introduced by the defendants when ruling on motions for judgment as a matter of law); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1314 (2d Cir. 1990) (the court is not restricted solely to the evidence that supports a non-movant's case, but rather the court must also consider the evidence favoring the movant to the extent that it is uncontradicted and unimpeached); *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131, 1137 (3d Cir. 1991) (in reviewing a district court order denying a motion for a judgment notwithstanding the verdict, we "view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict . . . [and] ascertain from a review of the record whether there is sufficient evidence to sustain the verdict of the jury"); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1979) (court held that in ruling on a motion for judgment notwithstanding the verdict, the trial court must consider the record as a whole and in the light most favorable to the party opposed to the motion); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (age discrimination case citing

Boeing, the court held that when reviewing a case for sufficiency of the evidence, the Court of Appeals reviews evidence presented in the light most favorable to the non-moving party); *Deimer v. Cincinnati Sub-Zero Prod., Inc.*, 58 F.3d 341, 343-44 (7th Cir. 1995) (the court must view the evidence in the light most favorable to the non-moving party and determine whether there is a jury question presented); *Panter v. Marshall Field*, 646 F.2d 271, 281-82 (7th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (standard requires court to view all of the evidence in the light most favorable to appellant); *Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997), *cert. denied*, 140 L. Ed. 2d 798 (1998) (when ruling on a Rule 50(b) motion, the entire record should be considered as it existed when trial closed); *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1263 (10th Cir. 1998) (judgment as a matter of law is warranted only if the evidence points but one way and all of the evidence and inferences therefrom must be construed most favorable to the non-moving party); *Polston v. Boomershine*, 952 F.2d 1304, 1307 (11th Cir. 1992) (when considering a motion for directed verdict or judgment notwithstanding the verdict, we consider the evidence in the light most favorable to the party opposing the motion); *Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165, 1169-70 (11th Cir. 1991) (citing *Boeing* court held that it should consider all of the evidence in light most favorable to the party opposing the motion); and *Aka v. Washington Hosp., supra*, 156 F.3d at 1290.

There is strong support that even the Eighth Circuit would now support this logic and rule of law. While in *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983), the Eighth Circuit appeared to hold that only the non-moving party's evidence should be considered, the court's discussion at 377-378 n.7 makes it clear that the Eighth Circuit was not deciding that particular issue.[26] More importantly, the more recent Eighth

26. Indeed, on rehearing, the Eighth Circuit clearly revealed it was not deciding that issue. *Dace v. ACF Indus., Inc.*, 728 F.2d 976 (8th Cir. 1984).

Circuit opinion of *Bass v. Gen. Motors Corp.*, 150 F.3d 842, 845 (8th Cir. 1998), specifically holds that a post-verdict motion for judgment as a matter of law requires the court to determine whether the Record contains sufficient evidence to support the jury's verdict. *Bass*, 150 F.3d at 845. The court stated "in determining whether a plaintiff has made a submissible case, we must examine the sufficiency of the evidence in the light most favorable to the plaintiff and view all inferences in his or her favor". *Id.* The *Bass* court considered the sufficiency of all the evidence in a light most favorable to the plaintiff, the same standard the Fifth Circuit and every other circuit applies.

The standard for judgment as a matter of law at the end of all the evidence requires consideration of all the evidence but in a light most favorable to the non-moving party. When that is done *sub judice*, the opinion of the Fifth Circuit is unassailable. Reeves failed to present and create a jury issue of pretext — whether that is provided by the so-called "pretext plus" doctrine or by the so-called "pretext only" doctrine, as espoused and refined by the Sixth Circuit in *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d at 1084.

The issue in discrimination cases is simply whether or not there was evidence that the defendant intentionally discriminated against the plaintiff. The *McDonnell-Douglas* burden-shifting framework mandates that the court consider evidence by the employer in support of its employment decision. If plaintiff establishes a *prima facie* case, defendant then produces evidence in support of its decision, and then the plaintiff must establish that the reasons given by the employer were false and that the real reason for the decision was discrimination. This court has made it clear that the reason given by the employer for its decision is very important in determining whether a jury question is created and to hold that only the non-movant's evidence should be considered would directly contradict the burden-shifting analysis previously mandated in *McDonnell-Douglas*. The standard for judgment as a matter of law is and

should always be viewing all of the evidence in a light most favorable to the non-moving party. Otherwise, the statute has been turned into a for-cause statute and employers will have a jury decide whether any decision that the employer makes was appropriate in the jury's eyes. This is certainly not what this Court envisioned and the *Boeing v. Shipman* standard is a sound approach to considering whether the cases should be submitted to the jury.

As part of this fallacy in the argument of Petitioner, throughout his brief, he totally departs from the scheme of proof, which necessarily flows in an employment discrimination case (established in *McDonnell-Douglas* and its progeny) but instead cites cases requiring a different scheme of proof with no requirement that in the ultimate analysis a plaintiff must prove "pretext for discrimination". To be sure, Petitioner's own citation of authority (*Br. of Pet. at pp. 33, 36*), *Galloway v. United States*, supports the proposition that the guaranty of jury trial in suits of common law, given by the Seventh Amendment, do not deprive the federal courts of the power in a jury case to direct a verdict upon the ground of insufficiency of the evidence, just as the standard of proof required for the submission of evidence to a jury is essentially one to be worked out in particular situations and for particular types of cases, the essential requirement being that mere speculation should not be allowed to "do duty for probative facts". *Galloway v. United States*, 319 U.S. at 389, 395. *See also Parklane Hosiery v. Shore*, 439 U.S. at 336-337.

Even if we were to accept Reeves' argument that the court should only consider the evidence favorable to Petitioner and/or the uncontradicted evidence, the result would be the same. The undisputed facts are: (1) Petitioner made errors; (2) the same errors were made by Caldwell and Oswalt and did and would have resulted in their discharge; (3) Petitioner made reference to at least one employee in his department as "the old man"; (4) the alleged remarks of Chesnut had no connection to the

subsequent termination decision resulting in the termination of Petitioner and Caldwell; and (5) the person who allegedly made the statements was only one of three (3) persons who independently recommended termination and not the one who made the decision to terminate. Thus, under the "sufficiency of evidence", obviously, there was no showing of pretext! Therefore, if Reeves' showing is sufficient to create a jury issue, this would mean that speculation, surmise, and conjecture would be sufficient to create a jury issue.[27] This, undoubtedly, is what the D.C. Circuit had in mind in *Aka v. Washington Hosp. Ctr.*, *when* the court found that:

> . . . [t]he court must consider all the evidence in its full context in deciding whether the plaintiff has met his burden of showing that a reasonable jury could conclude that he had suffered discrimination. . .

Id., 139 F.3d at 1296.

Again, at this stage of the trial, a trier of fact may not disregard the defendant's explanation without countervailing evidence (not a subjective belief) that the employer's stated reason was not the real reason for the discharge. *EEOC v. La. Office of Community Serv.*, *supra*, 47 F.3d at 1443-44.

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27. Obviously, this is what Petitioner desires inasmuch as he contends that a jury could speculate that Petitioner was fired because of his age but Caldwell for non-age reasons. (*Br. of Pet. at p. 29*). Further comment would only reiterate the obvious.

CONCLUSION

The issue in this case was dictated by the Petitioner when he filed his Complaint — alleging his termination was because of age — not because of personality clashes, conflicts, or hurt feelings. Thus, it is only logical that one such as Petitioner, after presentation by Respondent of its legitimate, non-discriminatory reason, should be required to introduce evidence that Respondent committed the action upon which the Complaint is based, to-wit, "age discrimination" and that this should be done beyond speculation. *Hicks* stated so by finding that the fact that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that plaintiff's proffered reason of [age] is correct." *Hicks*, 509 U.S. at 524. As this Court in *Hicks* held that Title VII is not a cause of action for perjury, *Id.* at 521, it is also beyond doubt and beyond question that the Act is not a "just cause" statute but prohibits and proscribes only one action — discrimination because of age.

Again, Petitioner totally departs from the scheme of proof that necessarily flows in an employment discrimination case and, instead, cites and relies upon cases requiring a different scheme of proof with no requirement in the ultimate analysis that a plaintiff must prove "pretext for discrimination".

There is serious doubt as to whether this case is even the appropriate case for the Court to decide between what Petitioner, in essence, denominates as "pretext plus" as opposed to "pretext only". Regardless of the standard applied, Petitioner's failure is absolute, as he failed to overcome more fundamental rules of proof that are entrenched in these types of cases and which have been established both in this Court and in the courts of appeal. Thus, it is submitted, that in this particular case, the Court of Appeals was correct in finding there was insufficient evidence under the "sufficiency of

evidence" test for submission of this case to the jury based upon an alleged violation of the Act. Moreover, regardless of whether this Court follows the standard of considering all the evidence but in the light most favorable to the non-movant, or (*as Reeves prefers*) of considering only the testimony of the non-movant and/or the uncontradicted testimony, the action of the Court of Appeals was correct.

Respectfully submitted,

TAYLOR B. SMITH
Counsel of Record
BERKLEY N. HUSKISON
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Post Office Box 1366
Columbus, MS 39703
(662) 328-2316

POPE S. MALLETTE
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Post Office Box 947
Oxford, MS 38655
(662) 234-4845

Attorneys for Respondent

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IN THE
Supreme Court of the United States

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court for Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

JIM WAIDE
(Counsel of Record)
WAIDE, CHANDLER & FLEITAS, P.A.
Attorneys at Law
P.O. Box 1357
Tupelo, MS 38802
(662) 842-7324
Attorneys for Petitioner

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167

ALAN B. MORRISON
MICHAEL J. QUIRK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-7724

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REPLY ARGUMENT I.

AN APPEALS COURT'S RECONSIDERATION OF "ALL OF THE EVIDENCE" IN DETERMINING WHETHER TO OVERTURN A JURY VERDICT RESULTS IN INACCURATE DECISION-MAKING. RECONSIDERING "ALL OF THE EVIDENCE" CAUSES THE APPEALS COURT TO DECIDE THE FACTS, NOT THE LAW.

The primary role of federal appellate courts is to decide issues of law. Instead, Respondent devotes 19 pages of its brief to its version of the *facts*. Approximately 18 of those pages present "facts" favoring Respondent, the movant on the motion for judgment as a matter of law. Such a view of the facts is inconsistent with the Seventh Amendment, under which the jury is supposed to be the fact finder. The correct fact finder -- the jury -- disbelieved the "facts" as stated by Respondent, and believed the contrary facts produced by Mr. Reeves.

Reconsidering "all of the evidence" allows judges to accept as true the very evidence which the jury disbelieved. The parties' dispute over who made the decision to terminate Mr. Reeves is one of many examples of this. On page one of Respondent's brief (hereinafter "R. Br."), Respondent states: "Reeves was terminated by Sandra Sanderson on October 23, 1995 ...". But the non-movant's evidence, which the jury accepted, was that Mr. Reeves was not terminated by Sandra Sanderson, but by the age-biased Chesnut. Tr. at 3, 4, 80, 81.

Page eleven, n. 15, brief of Respondent states the "facts" (which really means evidence favoring the movant) to be that "Reeves ... according to his own testimony, was

allowing Mitchell to be paid for periods of time when he was not working!" Mr. Reeves' testimony was just the opposite. Mr. Reeves swore that company officials "knew that his [Mitchell's] job was to come in [early] and get the machines ready." Tr. at 336.

Relying on "all of the evidence," Respondent claims Reeves was responsible for the monthly reports. R. Br., p. 6. But Mr. Reeves' testimony, accepted by the jury, was just the opposite.

> Q. What was your responsibility as far as these monthly reports go that you have heard all of the discussion about?
>
> A. I had no responsibility on them.
>
> Q. What was your responsibility as far as writing people up?
>
> A. Russell [Caldwell] did the writing up. I had no responsibility.

Tr. at 335.[1]

Considering "all of the evidence," Respondent claims that the age-biased Chesnut was not involved in the 1993

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[1] One had to have the monthly reports in order to give writeups. Only by examining the monthly reports would one know whether or not an employee had missed the allotted five percent of time per month.

probation decision. This is true, according to movant's evidence. Chesnut swore three times that he had no knowledge in 1993 about Reeves having been put on probation and "had nothing to do with that. Tr. at 217, 235. But then, on cross-examination, Chesnut was shown his own affidavit, which states: "In December 1993, Russell Caldwell, manager of the department, and at the recommendation of affiant [Chesnut] as Director of Quality Control ... plaintiff was placed on probation." Tr. at 237.

Respondent states, brief, p. 9 at n. 10: "... *Petitioner's own counsel has admitted that the errors committed by the 33-year-old Oswalt (as shown in Exhibit D-5) were almost identical to those committed by Petitioner and were sufficient to constitute termination!*" (emphasis in original) The transcript does not support this assertion.

> Q. [By Mr. Chandler – Petitioner's counsel] Then the other people who are listed as employees of the special line, I concede there are numerous violations. But that was not Mr. Reeves' department, was it?
>
> A. No, it was not.

Tr. at 294-295. This can in no way be construed as an admission that Mr. Reeves, rather than Oswalt, made such errors.

Citing all of the evidence, Respondent claims low productivity was a cause of Petitioner's termination. R. Br., p.

1.[2] But non-movant's evidence was that Mr. Reeves' production was outstanding, his efficiency was 60 units per man hour, compared to the company goal was only 48 units per man hour. Tr. at 16-17.

Emphasizing and even exaggerating the "movant's" evidence, Respondent says that Mr. Reeves never denied "he committed errors." R. Br., p. 23. But Mr. Reeves' evidence was just the opposite. Mr. Reeves emphatically denied any of the errors with which Chesnut charged him. Tr. at 71-73.[3]

Respondent claims the purported study showed "absenteeism." R. Br., pp. 8-10. The evidence, favoring the jury verdict, was just the opposite. The asserted study of hinge room absenteeism revealed that over a three month period the

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[2] This contradicts Respondent's position at trial. At trial, Respondent's counsel claimed that "production was not the reason." Tr. at 327.

[3] Reeves testified that when other workers have committed the types of errors that Chesnut alleges Reeves to have committed, they were corrected simply by adjusting an employee's paycheck and paying him any overpayments out of a subsequent paycheck. Tr. at 71-73. Besides misrepresenting the facts, a rule that "all of the facts" will be considered allows an appeals court to emphasize facts that a jury may well have found insignificant. For example, Respondent emphasizes the fact that the 45 year old Caldwell was also fired. Of course, a jury may have thought that this was also age discrimination, in view of the fact that Reeves was replaced by less-efficient employees in their thirties, and Caldwell may have been also.

35 employees on the regular line had been out sick a combined total of eleven days (an annual rate of 1.25 sick days per employee) and had taken a combined total of eight personal dates (an annual rate of .9 personal days per employee). J.A. at 21. Not surprisingly, there was no actual testimony that such a minuscule rate of absences would be "excessive."

Respondent asserts that its investigation identified repeated errors in the preparation of attendance records, but says almost nothing about the nature of those asserted mistakes. Cross-examination revealed that the asserted problem was of truly minuscule size. Respondent's witnesses conceded that almost all the asserted errors concerned the entry of a particular code on company time reports. Employees were expected to be at work from 7:00 a.m. until 3:00 p.m. During the period studied there were instances, occurring on average about once a day, in which the daily sheets prepared by petitioner recorded that the employee was present at 7:00 precisely. Respondent did not dispute that the workers were actually there; rather, it insisted that the employees were in fact required to arrive at work no later than 6:59 a.m.. Thus company officials testified that an employee who clocked in at the firm's time clock at 7:00 was technically *late* for work. Tr. at 119, 128, 241, 245, 246-47, 263. Supervisors, they insisted, were responsible not only for recording when workers were on the job, but also for placing an "01" code next to the entry of any tardy worker. Petitioner's asserted error was failing to place the "01" code next to each entry with a 7:00 starting time. Tr. at 140, 154, 205-06, 319. As vice president Jester testified, the report revealed instances "where someone punched in at seven o'clock and the supervisor didn't code it correctly . . . . That's what the whole case is about." (Tr. 324).

The testimony that these records were miscoded was squarely contradicted by petitioner, who testified both that the workers in question were in fact on the job before 7:00 and that Chesnut knew that that was the case.

> Q. How do you know that employees who were recorded as punching in at exactly seven o'clock were not late arriving at their work station?
>
> A. Because I was the one that started the line up. I was standing over there where I could see the line . . . I announced seven o'clock. Turn the line on. If there was anybody wouldn't have been at their station I would knew [sic] that they weren't at the station.
>
> Q. Was Mr. Chesnut aware of this practice?
>
> A. Yes, he was.

Tr. 335. Petitioner further explained that the entry "7:00" was made by hand on time records when, as regularly occurred, the factory's time clock failed to register when an employee punched in. Moreover, Chesnut testified that he was invariably present in the hinge room at 7:00 a.m., and so he would have had personal knowledge if there were in fact late arriving workers. Under these circumstances, the jury was plainly within its province in accepting petitioner's contention that the alleged problems with tardy employees were simply a cover to get rid of an unwanted older worker.

Thus, time and again, Respondent, purporting to rely on "all of the evidence," cites as the true "facts" of the case evidence or inferences which were contradicted by Mr. Reeves' evidence. A court rule permitting reconsideration of "all of the evidence" allows the jury verdict loser to exaggerate and emphasize the evidence favoring it and, thus, persuade an appeals court to accept as true evidence the jury did not believe.

Consideration of "all of the evidence" is inconsistent with this Court's precedents, since this Court has established that where there are conflicting accounts of the same circumstances, the trier of fact's decision as to which version to credit is conclusive. *Dunning v. Colley,* 281 U.S. 90, 94 (1930). "It is true that there was testimony tending to show a different state of facts ... But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court ...". *Richmond & Danville R.R. v. Powers*, 149 U.S. 43, 47 (1893). According to *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947):

> The choice of conflicting versions ..., the decision as to which witness was telling the truth ... are questions for the jury. Where uncertainty ... arises from a conflict in the testimony ... the question is not one of law but of fact to be settled by the jury.[4]

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[4] Examples of incorrect factual statements made by Respondent demonstrate that a court purportedly considering "all of the evidence," may actually overlook the facts the jury found. This Court has noted that appeals courts have

(continued...)

Besides allowing the court of appeals to accept as true evidence contradicted by non-movant's evidence, reconsideration of "all of the evidence" in the manner proposed by Respondent allows the appeals court to draw its own inferences instead of leaving this task to the jury.

The appeals court did not deny that the jury could reasonably have found that there was pretext. From the finding of pretext, there are two inferences that can be drawn – that Petitioner was fired because of an illegal discriminatory reason (age) or that he was fired for some other unspecified reason. By finding no age discrimination, the appeals court drew the inference (lack of discrimination) in favor of the moving party. But it is established that "the comparative weighing of conflicting evidence and inferences is a core jury responsibility." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "The very essence of the [the jury's] function is to select among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria P.U.R. Co.*, 321 U.S. 29, 35 (1944).

This limitation is illustrated by *Hunt v. Cromartie*, ___ U.S. ___, 119 S.Ct. 1545 (1999). The case turned in significant part on motives in adopting the redistricting plan under review.

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[4](...continued)
sometimes reversed jury verdicts by "overlooking" crucial evidence favoring the jury verdict winner. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 701 (1967); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962).

Much of the underlying data was itself not in dispute, and the parties had offered competing expert analyses which supported conflicting conclusions regarding the motives of the legislature which had adopted the plan. This Court held that the dispute over motive could not be resolved as a matter of law:

> Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivations finding or in favor of a political motivation finding or in favor of a political motivation finding. The District Court nevertheless concluded that race was the "predominant factor" in the drawing of the district. In doing so, it either credited [the moving party's] asserted inferences over those advanced and supported by [the nonmoving party] or did not give [the nonmoving party] the inference they were due. In any event, if was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage.

119 S.Ct. at 1552.

Contrary to the view of the court of appeals,[5] this

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[5] Commentators have noted a high rate of appellate reversal of jury verdicts, particularly in discrimination cases. *See*, Eric Schnapper, *Judges Against Juries: Appellate Review of Federal Jury Verdicts*, 1989 Wis. L. Rev. 237, 248-49 (1989). There appears not to be a single discrimination case
(continued...)

Court's precedents respect the Seventh Amendment and reject any idea that an appeals court has the authority to consider "all of the evidence," and to then rest on trial facts contradicted by non-movant's evidence. *Fowle v. Common Council of Alexandria*, 24 U.S. 320, 322 (1826):

> Indeed, the nature of the proceedings upon a demurrer to evidence, seems to have been totally misunderstood in the present case. It is no part of the object of such proceedings, to bring before the Court an investigation of the facts in dispute, or to weigh the force of testimony ... that is the proper province of the jury.

Contrary to the view that a court of appeals should weigh "all of the evidence," to determine whether the jury's verdict was "reasonable," the "established rule [is] that in passing upon whether there is sufficient evidence to submit an issue to the jury [the court] need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). The simple,

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[5](...continued)
since 1996, however, where a court of appeals has overturned a jury verdict in favor of a defendant for lack of evidence. Thus the fears of the anti-federalists that, without the Seventh Amendment, the judges would favor the "money class," has been realized through judicial decisions. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671-77.

correct rule is that rather than weighing "all of the evidence" in passing upon a peremptory instruction, the court may assume that the jury concluded that the non-movant's witnesses were lying and the non-movant's witnesses were telling the truth. *Ewing's Lessee v. Burnet*, 36 U.S. 41 (1837).

One of Respondent's amici claims that a court should not consider only non-movant's evidence because a hypothetical jury might disregard the testimony of 40 witnesses over a single discredited witness. Product Liability Advisory Counsel, Inc.'s brief, pp. 18-19. In this case, however, there are only three interested witnesses attempting to discredit Reeves' testimony. Even Amici's hypothetical would still have to be decided by a jury:

> If there is a conflict in direct testimony, it is clear that the jury must be allowed to determine which witnesses to believe, even if it chooses to believe a single witness of dubious credentials in preference to twenty witnesses of unasailed integrity ... The principle of minimum intrusion on the jury's function is thus easily sufficient to justify the jury's general freedom ... to credit the single witness".

Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev., 903, 928-929 (1971). Of course, if a jury errs, the remedy is a motion for a new trial, subject to appellate review for an "abuse of discretion." *Gasperini v. Center for Humanities*, 518 U.S. 415, 436 (1996).

Respondent claims that it is entitled to judgment as a matter of law because Chesnut testified that the company *would* also have fired the 35 year old supervisor (Oswalt), who assertedly had made as many errors as Petitioner, if Oswalt had not quit earlier. This argument contravenes this Court's rule that the jury has the right to reject the testimony of an "interested witness." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408 (1899); *See also*, Cooper, *Directions for Directed Verdicts*, *supra* at 943:

> Likewise, in situations where a witness is called upon to testify to what would have been done if something else had not first occurred, the slope down into comfortable certainty that the favorable thing would have been done is so easy that a policy of free disbelief seems incontestible ... Examples could be multiplied; the point seems sufficiently made that there are many situations in which interested testimony may properly be rejected without other showing to support its rejection.

Respondent cites to *Whitley v. Albers*, 475 U.S. 312, 322 (1986), but this is not authority for a rule that all of the evidence should be considered. *Whitley v. Albers* never said that this Court was considering *all* of the evidence, or that this Court was resolving any conflict in the evidence in favor of the movant. Instead, this Court accepted as true the non-movant's expert testimony that prison officials had "obviously erred in judgment," and stated that a mere error in judgment "falls far short of a showing" there was an Eighth Amendment violation. 427 U.S. at 323. *Whitley v. Albers* does not address the issue of whether the court should consider all of the evidence or only

non-movant's evidence.

Parklane Hosiery Co. v. Shore's, 439 U.S. 322 (1979),[6] statement that the Seventh Amendment does not incorporate every "procedural detail" of the common law right to trial by jury does not apply to these facts. The rule that only the non-movant's evidence is to be considered is not a "procedural detail" of the common law. It is at the heart of the common law right to jury trial. If all of the evidence be considered, the right to jury trial is greatly diminished, since an appeals court, under the guise of considering "all of the evidence" may weigh the evidence, and disagree with a jury's fact finding.

Considering only the verdict winner's evidence is every bit as "essential" to the Seventh Amendment as is the rule that only the jury, not an appeals court, can retry the facts, so as to reduce the damages, a principle that this Court affirmed as recently as *Hetzel v. Prince William County*, 523 U.S. 208, 118 S.Ct. 1210, 1211 (1998).

Nor may Respondent take solace from the three 1986 cases approving grants of summary judgments. These cases cannot be counted as infringements upon the Seventh Amendment's Re-Examination Clause since, by definition, no jury has been empaneled when a summary judgment is granted. All these cases support the position that only non-movant's and

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[6] In fact, *Parklane Hoisery Co.* supports Petitioner because its result was based on the Seventh Amendment by stating that "at common law a litigant was not entitled to have a jury determine issues that had been previously adjudicated by the chancellor.

the uncontradicted, unimpeached evidence of movant is to be considered. *See Matsushiti Elect. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (Lower court is to search the record for evidence that might "permit a trier of fact to find the petitioners conspired to [set prices] despite the absence of any apparent motive to do so"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return the verdict for that party); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (Summary judgment is proper if non-moving party fails to produce evidence "sufficient to establish the existence of an element essential to that party's case ...").[7]

[7] The courts of appeals have sometimes construed these cases to deny jury trials in the face of factual disputes. *See* Ann C. McGinley, *Credulous Courts and the Tortuous Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 207 (1993) (Lower courts have granted summary judgment in cases where there exist questions of fact concerning the employer's motive, thereby denying employment discrimination plaintiffs their "day in court" historically promised by the American Model of Litigation.

REPLY ARGUMENT II.

THE COURT OF APPEALS MAY NOT BE AFFIRMED ON THE THEORY EITHER THAT THE CASE INVOLVES ONLY THE "BUSINESS JUDGMENT" OF THE RESPONDENT, OR THAT AGE-BIASED REMARKS ARE INSUFFICIENT TO PROVE DISCRIMINATION.

Respondent argues that the court of appeals must be affirmed since the jury may not substitute its opinion of correct business judgment for that of the employer. R. Br., pp. 23-24. In order to determine whether there was pretext for discrimination, however, the jury must examine the proffered explanations to decide whether they are true or whether they are an excuse for discrimination. A jury must determine whether there actually were any rational business reasons for the decision,[8] or whether the purported business reasons are a lie concocted to cover up discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), determined that one method of proving discrimination was to show that the employer's proffered explanation (i.e., his business reasons) is unworthy of belief. Likewise, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973), held that

[8] The District Judge specifically told the jury that it could not substitute its business judgment for that of Respondent, Jury Charge, p. 8, and also told the jury it could not find for Petitioner unless it found the Respondent's reasons for the decision were a pretext for age discrimination. Jury Charge, p. 8. Petitioner has requested the District Court Clerk forward the jury charge to this Court as a supplemental record.

the fact finder was entitled to examine the defendant's business practices to see if "white employees were treated better than plaintiff," since this would be "especially relevant to prove discrimination."

The court of appeals should not be upheld on the grounds that "stray remarks" are not evidence of discrimination. True, many courts of appeals have branded apparently discriminatory statements as "stray remarks," and not as evidence of a discriminatory employment decision. Many other authorities disagree, however, even in the Fifth Circuit.[9]

The cases permitting a jury to decide the issue of whether such statements are evidence of discrimination must be correct since the "very essence of the [jury's] function is to select from among conflicting inferences ... that which it considers most reasonable." *Tennant v. Peoria P.U.R. Co.*, 321 U.S. 29, 35 (1944); *Anderson v. Bessermer City*, 470 U.S. 564, 574-575 (1985).

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[9] *See Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996); *Smith v. Berry Co.*, 165 F.3d 390, 394 (5th Cir. 1999); *Ray v. Iuka Municipal Sep. School Dist.*, 51 F.3d 1246, 1250 (5th Cir. 1995); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1094 (5th Cir. 1994); *Portis v. First National Bank of New Albany, Mississippi*, 34 F.3d 325, 329 (5th Cir. 1994); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 733 (5th Cir. 1999); *Sischo-Nownejad v. Merced Comm. College Dist.*, 934 F.2d 1104, 1112 (9th Cir. 1991); Johnson *v. Minnesota Historical Soc.*, 931 F.2d 1239, 1244 (8th Cir. 1991).

Respondent insists that the jury could not reasonably have inferred that Chesnut still harbored such age-based animus when petitioner was dismissed because his remarks were too "remote in time" R.Br. 24. On its view, an inference of animus at the time of the October 1995 dismissal required proof of "contemporaneous" biased remarks (R.Br.25), even though Chesnut's remarks were made within two months of petitioner's dismissal. But in both civil and criminal litigation, prior expressions of attitudes or emotions have long been regarded as probative evidence to explain later actions. 2 Wigmore on Evidence, §§ 395-406 (1940). If a jury concluded that a supervisor in August 1995, or August 1994, harbored ill-will towards older, female, or minority workers, it could reasonably infer that the supervisor still adhered to those views in October 1995. Individuals who entertained prejudices at one point in their lives can, and at times happily do, change their attitudes; others, regrettably, do not. Nothing in federal law requires a trier of fact to assume that such attitudes expressed at an earlier date have--or have not--dissipated with the passage of time. That question is for the trier of fact.

Respondent's claim that discriminatory remarks are not "evidence" of discriminatory discharge even contradicts a federal rule of evidence. Federal Rule of Evidence 401 says that "relevant evidence means evidence having any tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence." Obviously, it is "more probable" that one who has said that Petitioner is "too damn old for the job" fired him because of his age than would be the case if such evidence did not exist.

Some courts have recognized the fallacy of an arbitrary rule forbidding consideration of such remarks:

> [The defendant] would have this court hold that discriminatory remarks are tied to the decisional process only if a decisionmaker said something to the effect of "I'm firing you because you are too old." Few employers who engage in illegal discrimination, however, express their discriminatory tendencies in such a direct fashion ...".

EEOC v. Pape Lift Co., 115 F.3d 676, 684 (9th Cir. 1997). The existence of a supervisor's animus toward older, minority, or female workers does not compel the conclusion that a disputed employment decision was motivated by that bias, but it assuredly would support such an inference. A contemporaneous statement of animus "directly related" to a disputed decision (e.g., "Let's fire Reeves, he's old") would be *direct* evidence of discrimination, and would shift to the employer the burden of proving that it would have taken the same action regardless of Petitioner's age. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). But less conclusive evidence is sufficient to support, although it would not compel, a finding of discrimination. In each case, it is up to the jury to weigh all of the evidence and decide whether the remarks were too vague, too distant, or counterbalanced by other evidence to support a claim of discrimination. That is what the jury did here, and the court of appeals and Respondent are in error in their claim that Chesnut's remarks are irrelevant.

Holding that a jury may find discrimination where a member of the disfavored class is replaced by a member of the favored class and the only reasons the employer gives are lies is consistent with this Court's precedents, and respects the right to a jury trial. On one point, Petitioner and Respondent agree.

We agree that a verdict may be rendered for Petitioner only if he proves that he was fired because of his age. The parties differ over who is to make that decision.[10] Mr. Reeves believes that a jury should be allowed to infer discriminatory intent where an employer fires a more efficient worker and replaces him with a younger, less-efficient worker, and where the only reasons given for the decisions are discredited. "When a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (1989) (O'Connor, J., concurring).

CONCLUSION

Respondent asks this Court to adopt a practice, which it characterizes as a plan for judicial review of "of all the evidence" that supplants juries as finders of fact under the Seventh Amendment. Thus, Respondent proposes that the preeminent responsibility for assessing the sufficiency of the evidence at a jury trial belongs to federal appellate judges. Respondent suggests that the appellate courts, including this Court, should conduct a *de novo* assessment of the evidence without any regard to the conclusion reached by the district judge, who was present throughout the trial, that the jury's findings were supported by the record.

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[10] District Judge Senter told the jury the Petitioner had to prove the Respondent's reasons were a pretext for age discrimination. Jury Charge, p. 8. Petitioner's counsel has requested the district clerk to send this jury charge to this Court, as a supplemental record.

Respondent misapprehends the respective roles of trial and appellate judges in the federal judicial system. The expertise of appellate judges is the resolution of legal issues. Their special expertise does not lie in examining such mundane matters as the workday occurrences at a toilet seat factory. Appellate judges who attempt such a task, in view of their limited time, often will make crucial mistakes as to the facts, as they did in this case. Thus, "de novo all of the evidence review" urged upon the Court by the Respondent wastes precious judicial resources, while causing a less accurate result.

The jury verdict should be reinstated.

Respectfully submitted,

JIM WAIDE
(Counsel of Record)
WAIDE, CHANDLER & FLEITAS, P.A.
Attorneys at Law
P.O. Box 1357
Tupelo, MS 38802
(662) 842-7324
Attorneys for Petitioner

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98105
(206) 616-3167

ALAN B. MORRISON
MICHAEL J. QUIRK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-7724

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In the Supreme Court of the United States

ROGER REEVES, PETITIONER

v.

SANDERSON PLUMBING PRODUCTS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record

BARBARA D. UNDERWOOD
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

C. GREGORY STEWART
General Counsel

PHILLIP B. SKLOVER
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

DORI K. BERNSTEIN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTIONS PRESENTED

1. Whether prima facie proof of age discrimination, coupled with evidence sufficient to support a finding that the employer has not offered its true reason for an adverse employment action, is sufficient to sustain a jury verdict of intentional discrimination in violation of the Age Discrimination in Employment Act.

2. Whether, in passing on a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, a court considers all of the evidence or only the evidence favorable to the party against whom judgment is sought.

3. Whether the standard for granting judgment as a matter of law under Rule 50 is the same as the standard for granting summary judgment under Federal Rule of Civil Procedure 56.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISION

This case concerns the amount and nature of proof required to sustain a jury's finding of age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (EEOC) has responsibility for interpreting and enforcing the ADEA, which prohibits discrimination in employment on the basis of age. The courts have applied the same standards of proof under the ADEA as under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 310-311 (1996). The Attorney General and the EEOC share responsibility for enforcing Title VII, which prohibits employment discrimination on the basis of race, sex, religion, or national origin. The resolution of this case will affect the discharge by the Attorney

General and the EEOC of their responsibilities under those statutes.

STATEMENT

1. Petitioner Roger Reeves worked for respondent Sanderson Plumbing Products, a manufacturer of toilet seats and covers, for 40 years. Pet. App. 2a. In October 1995, respondent fired petitioner from his job as a supervisor in the Hinge Room. Petitioner was 57 years old. On three successive occasions over the next two years, respondent filled petitioner's former position with men in their thirties. *Id.* at 2a-3a.

The Hinge Room included a "regular line," supervised by petitioner, and a "special line," supervised by Joe Oswalt, a man in his thirties. Russell Caldwell, age 45, was manager of the Hinge Room and supervised both petitioner and Oswalt. As part of his duties, petitioner was required to keep daily attendance and tardiness records for the workers he supervised. Pet. App. 2a.

In late 1993, respondent's Department of Quality Control, under the direction of Powe Chesnut, conducted an efficiency study of Hinge Room operations. Pet. App. 2a. Chesnut had married company president Sandra Sanderson in 1988. *Id.* at 3a n.1. According to Oswalt, Chesnut was "in absolute power" at the plant for "as long as [he] could remember." 3 R. 80. Chesnut's efficiency study identified "productivity problems" on the regular line "stemming from a lax assembly line operation." Pet. App. 2a-3a. Consequently, at Chesnut's recommendation, petitioner was placed on a 90-day probation for unsatisfactory performance. *Ibid.*[1]

[1] At trial, Chesnut initially testified that he "made no instructions, no recommendation" that petitioner be placed on probation following the 1993 efficiency study. 4 R. 199. When confronted with his signed affidavit on cross-examination, however, Chesnut acknowledged that he had in fact recommended petitioner for probation in 1993. *Id.* at 237.

Company records showed that, during 1993, petitioner's productivity was comparable to that of Oswalt, the younger supervisor of the special line. See 3 R. 163-167; 4 R. 226. Yet only the regular line, supervised by petitioner, was subjected to an efficiency study, and only petitioner was placed on probation. 3 R. 166-167; 4 R. 228-229. After the probationary period, petitioner's productivity increased, and he was awarded a merit pay raise. 3 R. 103, 113.

By 1995, Chesnut had been promoted to Director of Manufacturing. Pet. App. 3a. Hinge Room manager Caldwell told Chesnut that the department was having trouble meeting production requirements due to "pervasive absenteeism and tardiness." *Ibid.* In the fall of 1995, Chesnut ordered an audit of the time records of Hinge Room employees for the months of July, August, and September. 4 R. 204-205. According to respondent, the audit disclosed "numerous timekeeping errors and misrepresentations" by Caldwell, Oswalt, and petitioner. Pet. App. 3a. Based on the audit results, Chesnut, Dana Jester, Vice President of Human Resources, and Tom Whitaker, Vice President of Operations, recommended that Caldwell and petitioner be discharged. Company President Sanderson followed the recommendation and fired both petitioner and Caldwell in October 1995. *Ibid.* Oswalt had left his job voluntarily on August 1, before the audit was conducted. 3 R. 79. Chesnut testified that, had Oswalt still been with the company, he would also have been discharged. Pet. App. 3a n.3.

Petitioner sued respondent in 1996, claiming that he was discharged because of age in violation of the ADEA. Petitioner testified at trial that, on the day he was fired, Chesnut told him that he was being dismissed because of a timekeeping error involving a single employee, Genie Mae Coley, who was paid for two days in September 1995 when she was absent from work. 3 R. 23. Petitioner demonstrated at trial, however, that he was in the hospital on the two days for which Coley was allegedly overpaid and that Caldwell was responsible for any error in Coley's time sheets. *Id.* at 17.

At trial, respondent asserted that petitioner was fired because of his "shoddy record keeping" in documenting the attendance and hours of employees under his supervision. Pet. App. 7a. According to respondent, petitioner's errors resulted in payments to employees for time they had not worked and failure to discipline employees who were absent or tardy. *Ibid.* Respondent maintained that the alleged errors in petitioner's record keeping exposed the company to the risk of union grievances or charges of unfair labor practices for inconsistent disciplinary actions. 3 R. 154. Chesnut acknowledged, however, that the company had never received a single union grievance or employee complaint arising from petitioner's timekeeping practices. 4 R. 267. Nor did respondent ever calculate the amount of any overpayment to employees resulting from alleged errors in petitioner's record keeping. *Id.* at 301.

Petitioner challenged the veracity of respondent's assertion that his record keeping was inaccurate. Pet. App. 8a. The vast majority of the errors attributed to petitioner arose from his failure to record as "late" employees who, according to the daily timesheet, had arrived at 7 a.m. for a 7 a.m. shift. 3 R. 118-123; 4 R.

241-245. Sanderson maintained that employees who clocked in at 7 a.m. could not be at their work stations as required for the start of the 7 a.m. shift, and therefore they should have been coded as "late" on the weekly timesheet. 3 R. 119-120.

Both petitioner and Oswalt testified, however, that respondent's automated time clock often failed to scan the "bar codes" on employees' time cards, in which case the initial daily timesheet would not reflect an arrival time. 3 R. 18-20, 84-85; 4 R. 335. Each supervisor was therefore required to record attendance manually by visually checking whether each employee was at his or her work station at the start of the 7 a.m. shift. 4 R. 335. When the daily time sheet failed to show that an employee had clocked in, but the supervisor had manually recorded that the employee was at his or her work station at the start of the shift, the supervisor would reconcile the records by writing in a 7 a.m. arrival time for the employee on the time sheet. 3 R. 18-20, 84-85; 4 R. 335. In those circumstances, even when an employee had actually arrived at work before 7 a.m., his time of arrival was recorded on the timesheet as 7 a.m. *Ibid.*

Chesnut confirmed that "there were times the bar code" on employees' time cards "wouldn't work," and, on those occasions, if "people were there at their work station[s]" at the start of the shift, the supervisors "would write in seven o'clock," and "[t]hat would show in the time card." 4 R. 243-244. Both Chesnut and Sanderson also acknowledged that employees who clocked in before 7 a.m. were treated as arriving at 7 a.m. for purposes of computing their pay. 3 R. 124-125; 4 R. 263.

Petitioner testified that he checked whether his employees arrived on time and assigned extra work to

any employee who was paid for arriving early or staying late. See Pet. App. 8a. According to petitioner, any record keeping errors that may have occurred resulted from "Caldwell's inattentiveness and not his own." *Ibid.* Sanderson agreed with petitioner that Caldwell, not petitioner, was responsible for preparing disciplinary write-ups for excessive tardiness or absenteeism. 3 R. 138.

Petitioner further testified that Chesnut regularly subjected him to verbal abuse on the job. 3 R. 26. In particular, petitioner recalled that, approximately two months before his termination, Chesnut approached him while he was trying to get a machine running and told him he was "too damn old to do [his] job." *Ibid.* On an earlier occasion, Chesnut commented that petitioner was "so old [he] must have come over on the Mayflower." *Ibid.* Oswalt corroborated the "obvious difference" in Chesnut's treatment of petitioner. *Id.* at 82. Oswalt recalled that, although he and Chesnut "had [their] differences," Chesnut's behavior toward him "was nothing compared to the way he treated [petitioner]." *Ibid.* Oswalt testified that Chesnut treated petitioner "as you would * * * treat * * * a child [with whom] you're angry." *Id.* at 83. According to Oswalt, Chesnut subjected petitioner to increased scrutiny, and "didn't treat [him] very well." *Ibid.*

At the close of the evidence, the district court denied respondent's motion for judgment as a matter of law and sent the case to the jury. 4 R. 354. The jury was instructed that, "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the discharge of plaintiff, then you shall find for the defendant." *Id.* at 368. The jury found respondent liable for willful discrimination based on age. The district court denied respondent's post-trial motion for judgment as a matter

of law or for a new trial, and respondent appealed. Pet. App. 4a.

2. The court of appeals reversed and rendered judgment for respondent. Pet. App. 1a-10a. On appeal, respondent did not dispute that petitioner had established a prima facie case of age discrimination, *id.* at 6a, and the court of appeals acknowledged that, based on the evidence at trial, "a reasonable jury could have found that [respondent's] explanation for its employment decisions was pretextual." *Id.* at 8a. The court ruled, however, that "whether [respondent] was forthright in its explanation for firing [petitioner] is not dispositive of a finding of liability under the ADEA" and went on to consider "as an essential final step * * * whether [petitioner] presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.*

In that inquiry, the court discounted the probative value of petitioner's evidence of respondent's discriminatory motivation, and concluded, in light of evidence favorable to respondent, that petitioner "did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA." Pet. App. 9a-10a. Although it acknowledged "the potentially damning nature of Chesnut's age-related comments," the court gave several reasons why it believed that those remarks were insufficient to show discriminatory motive in petitioner's discharge: The "comments were not made in the direct context of [petitioner's] termination," Chesnut was "just one of three individuals who recommended to Ms. Sanderson that [petitioner] be terminated," and petitioner produced no evidence that "any of the other decision makers were motivated by age." *Id.* at 9a. The court noted that two of the decision makers were over age 50,

and "20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60s." *Id.* at 9a-10a. Finally, the court remarked that all three Hinge Room supervisors—Caldwell and Oswalt as well as petitioner—were accused of inaccurate record keeping. Based on its review of the record, the court set aside the jury's verdict and rendered judgment for respondent. *Id.* at 10a.

SUMMARY OF ARGUMENT

Recognizing the difficult and sensitive nature of the question facing fact finders in cases of intentional employment discrimination, this Court has developed an evidentiary framework that enables employees to prove their cases through circumstantial evidence. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under that framework, an employee makes out a prima facie case of discrimination by presenting proof of actions by the employer that, if unexplained, more likely than not are based on factors prohibited by law. The prima facie case not only is sufficient to permit a trier of fact to find discrimination, but also gives rise to a mandatory presumption, which, if unrebutted, requires judgment for the employee. The employer can rebut the presumption by introducing evidence that, if believed, shows that the employer acted for a legitimate nondiscriminatory reason. The employee then has the opportunity to disprove the proffered explanation and demonstrate that it is a pretext for discrimination.

In *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 511 (1993), this Court held that proof that the employer's asserted reasons for its actions were not the true reasons does not compel judgment as a matter of law for the employee, because the fact finder still must

determine that the true reason was discrimination. The court of appeals in this case held that such proof not only does not *compel* judgment for the employee, but does not *permit* judgment for the employee without additional evidence of discriminatory intent.

That holding is inconsistent with the clear statement in *Hicks* that "rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination." 509 U.S. at 511 n.4. It is also inconsistent with the meaning of a prima facie case, the reasonable inferences that arise when an employer offers a discredited explanation for an action that has been challenged as discriminatory, and general evidentiary principles concerning the effect of presumptions and the inferences that fact finders are permitted to make.

In order to have his case presented to the jury, an employee ordinarily need not produce more than prima facie proof of discrimination plus evidence sufficient to support rejection of the explanation offered by the employer. If an employee has introduced such evidence, a court may not render judgment as a matter of law for the employer, except in the unusual circumstance in which the evidence otherwise conclusively establishes that the employer acted for a nondiscriminatory reason different from the one that the employer proffered.

In this case, petitioner presented prima facie proof of age discrimination and evidence that respondent offered a pretextual reason for his discharge. There was no evidence that would have precluded a reasonable jury from inferring from petitioner's proof that respondent fired petitioner because of his age. The evidence was therefore sufficient to sustain the jury's verdict that respondent violated the ADEA. In setting aside the verdict, the court of appeals improperly usurped

the jury's function of weighing the evidence, drawing reasonable inferences, and making the ultimate factual finding whether petitioner's discharge was unlawfully motivated by age.

ARGUMENT

THE COURT OF APPEALS ERRED IN AWARDING JUDGMENT AS A MATTER OF LAW TO RESPONDENT BECAUSE THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT THAT RESPONDENT FIRED PETITIONER IN VIOLATION OF THE ADEA

The Age Discrimination in Employment Act (ADEA or Act), makes it "unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The Act protects only workers who are "at least 40 years of age." 29 U.S.C. 631(a). The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace," and it is one component in "a wider statutory scheme to protect employees in the workplace nationwide." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (disability); the National Labor Relations Act, 29 U.S.C. 158(a) (union activities); and the Equal Pay Act of 1963, 29 U.S.C. 206(d) (sex)). Recent research indicates that age discrimination in employment continues to be a significant problem. See Marc Bendick, Jr. et al., *No Foot in the Door: An Experimental Study of Employment*

Discrimination Against Older Workers, 10(4) J. Aging & Soc. Pol'y 5 (1999).

In a case alleging unlawful disparate treatment in employment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). To prevail, the employee must show that his "protected trait actually played a role" in the employer's decisionmaking process "and had a determinative influence on the outcome." *Ibid.* This case concerns how much and what kind of evidence is sufficient for an employee to make that showing.

A. Prima Facie Proof Of Discrimination, Together With Evidence That The Employer Has Not Offered Its True Reason For An Adverse Employment Action, Is Usually Sufficient To Support A Jury Finding Of Discrimination

1. This Court has recognized that "the question facing triers of fact in discrimination cases is both sensitive and difficult," because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). To overcome the scarcity of direct proof of discriminatory motive, and to ensure that the "important national policy" embodied in the fair employment laws is achieved, *Aikens*, 460 U.S. at 716, the Court crafted, in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973), "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). That evidentiary framework helps the factfinder to decide the "elusive factual question of intentional discrimination" when an employee uses circumstantial evidence to establish disparate treat-

ment. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.8 (1981).[2]

To prove unlawful discrimination under the *McDonnell Douglas* framework, the employee "must carry the initial burden * * * of establishing a prima facie case," 411 U.S. at 802, by producing "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion," *Teamsters* v. *United States*, 431 U.S. 324, 358 (1977). For example, here petitioner established a prima facie case with proof that he was: (1) 57 years old (and thus within the statutorily protected age group); (2) qualified for his position as Hinge Room supervisor; (3) discharged; and (4) replaced, on three successive occasions over the next two years, by men in their thirties. See Pet. App. 5a-6a & n.11.

The prima facie case "creates a presumption that the employer unlawfully discriminated against the employee," and, if unrebutted, requires "judgment for the plaintiff because no issue of fact remains in the case." *Burdine*, 450 U.S. at 254. To rebut the presumption of

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[2] Every court of appeals "has applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*" to ADEA claims. *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 & n.2 (1996). Although this Court has "never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct," *id.*, the substantive "prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978). Moreover, the two statutes share a common purpose. *McKennon*, 513 U.S. at 358. The rationale of *McDonnell Douglas* is thus equally applicable to claims under either statute. See *Hazen Paper*, 507 U.S. at 612 (suggesting that the *McDonnell Douglas* "proof framework [is] applicable to ADEA"). Moreover, as in *O'Connor*, the parties in this case agree that the *McDonnell Douglas* framework applies. See 517 U.S. at 311.

discrimination and raise "a genuine issue of fact as to whether it discriminated" against the employee, the employer "must clearly set forth, through the introduction of admissible evidence, the reasons" for the challenged action. *Id.* at 254-255. For example, here respondent introduced evidence that it fired petitioner because of alleged errors in recording the absences and tardiness of employees under his supervision. See Pet. App. 7a-8a.

Once the employer has produced evidence of a legitimate, nondiscriminatory explanation for its decision, the employee has the opportunity to show that the "proffered reasons for [the employer's] decision were not its true reasons," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 187 (1989), but "were in fact a coverup for a * * * discriminatory decision," *McDonnell Douglas*, 411 U.S. at 805. The employee's proof "may take a variety of forms," and the employee is "not limited to presenting evidence of a certain type." *Patterson*, 491 U.S. at 187.

Evidence that the rule or criterion cited by the employer to explain its decision was applied in a discriminatory manner is especially relevant. *McDonnell Douglas*, 411 U.S. at 804. "Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [the employee] during his * * * term of employment," *ibid.*, including discriminatory remarks or instances of harassment or abuse by individuals responsible for the challenged employment decision. See *Patterson*, 491 U.S. at 188; *Aikens*, 460 U.S. at 713-714 n.2. Proof of the employer's "general policy and practice" with respect to employment of older individuals (in an ADEA case), including statistical evidence, "may be helpful" in demonstrating pretext, but statistics "may not be in and of themselves

controlling as to an individualized [employment] decision." *McDonnell Douglas*, 411 U.S. at 804-805 & n.19; see also *Furnco*, 438 U.S. at 579-580. Evidence challenging the factual accuracy of the proffered explanation is also probative of whether the explanation is a pretext for discrimination. *Burdine*, 450 U.S. at 259. Finally, the evidence supporting the employee's prima facie case "and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Id.* at 255 n.10.

2. In *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 511 (1993), this Court held that proof that the employer's asserted reasons for its actions were not the true reasons does not *compel* judgment as a matter of law for the employee. The employee always retains the burden of persuasion on the ultimate fact of discrimination. *Ibid.* By proving that the employer did not act for the reasons proffered, the employee has not ruled out the possibility that the employer acted for another nondiscriminatory reason. See *id.* at 514-515, 523-524. The Court therefore held that the employee is not entitled to judgment in his favor unless the fact finder actually determines that the employer's true reason was discrimination. *Id.* at 514. At the same time, however, the Court observed that the fact finder *may* determine that the employer's true motive was discrimination based on the employee's prima facie case and his proof that the employer did not offer the true reasons for its action, without additional evidence of discriminatory intent.

Although the Court held that "*there must be a finding of discrimination*" for an employer to be held liable, the Court made clear that "rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination." 509 U.S. at 511 n.4. Put another way, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and * * * '[n]o additional proof of discrimination is *required*.'" *Id.* at 511. That the Court meant what it said in *Hicks* is confirmed by its decision to remand the case, *id.* at 525, which would have been pointless unless the employee could still prevail, although he had only made out a prima facie case and showed that the reasons proffered by the employer were unworthy of credence.

The reasoning behind the Court's holding in *Hicks* supports that conclusion. As we explained at page 14, *supra*, the Court held that the fact finder's rejection of the employer's proffered explanation for its action could not compel judgment for the employee because there remained a possibility that the employer acted for an unstated but nondiscriminatory reason. The existence of that possibility prevents judgment as a matter of law for the employee because a reasonable jury might still find for the employer if it concludes that the employer in fact acted for a nondiscriminatory reason. But the existence of that possibility cannot compel judgment as a matter of law for the employer because a reasonable jury need not reach that conclusion.

a. The principle that an employee may prevail based on only the prima facie case and evidence supporting rejection of the employer's proffered reason follows from the quantum of evidence necessary to establish a prima facie case. As we have explained, to make out a prima facie case, an employee must present evidence that is itself sufficient to support an inference of discrimination. See p. 12, *supra*; *e.g.*, *O'Connor*, 517 U.S. at 312 ("the prima facie case requires '*evidence adequate to create an inference that an employment deci-*

sion was based on a[n] [illegal] discriminatory criterion'") (quoting *Teamsters*, 431 U.S. at 358); *Burdine*, 450 U.S. at 253 (employee must prove "circumstances which give rise to an inference of unlawful discrimination"); *Furnco*, 438 U.S. at 579-580 (prima facie case is "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations").

The prima facie case "eliminates the most common nondiscriminatory reasons" for the employer's action and raises an inference that discrimination is more likely than not the reason. *Burdine*, 450 U.S. at 254. That is because

> we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as [age].

Furnco, 438 U.S. at 577.

Thus, by proving a prima facie case, an employee has provided evidence that, if unexplained, is sufficient for a jury to find discrimination. If the employer then comes forward with a nondiscriminatory explanation, but the employee produces evidence sufficient for a jury to reject that explanation, the persuasive force of the evidence supporting the prima facie case remains sufficiently strong to support a finding of discrimination.

That is true even though the mandatory presumption that this Court accorded the prima facie case in *McDonnell Douglas* "drops from the case" when the employer satisfies its burden to produce an explanation that, if believed, would allow a verdict in its favor. *Burdine*, 450 U.S. at 255 & n.10; *Hicks*, 509 U.S. at 510-511. As this Court has explained, the persuasive force of the evidence underlying the prima facie case is independent of its impact as a procedural device. See *Burdine*, 450 U.S. at 255 n.10. Thus, although "[a] satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence, * * * this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Ibid.*

That approach accords with the general treatment of presumptions under Federal Rule of Evidence 301, which informs the operation of the *McDonnell Douglas* presumptions. See *Burdine*, 450 U.S. 255 n.8; *Hicks*, 509 U.S. at 507, 511. "Under Rule 301, the effect of rebutting evidence does not completely dissipate the presumption. Unless no reasonable jury could disbelieve the rebuttal, the presumption still suffices to carry the issue to the jury. However, the jury is no longer instructed that it may presume the existence of the presumed fact, but only that it may infer it." 21 Charles A. Wright et al., *Federal Practice and Procedure* § 5122, at 572 (1977); see H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 5-6 (1974) ("If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it

may infer the existence of the presumed fact from proof of the basic facts.").[3]

b. When an employee provides sufficient evidence for the jury to reject the nondiscriminatory explanation offered by the employer, not only may the jury continue to infer discrimination from the prima facie proof, but it now has *additional* evidence from which it may reasonably infer discrimination. "As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi* v. *Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). It is reasonable to conclude that an employer who gives a false explanation for conduct that has been challenged as discriminatory is dissembling to cover up the discrimination. See *Hicks*, 509 U.S. at 511, 517; 5 Leonard B. Sand et al., *Modern Federal Jury Instructions* ¶ 87.01, at 87-86 (1999) (Instruction 87-27).

That reasoning accords with the more general principle that a fact finder may infer consciousness of guilt when a party acts dishonestly about facts material to litigation. For example, a jury may (although it is not compelled to) infer that a criminal defendant who makes a false exculpatory statement believes he is guilty and thus probably is guilty. See *Wright* v. *West*, 505 U.S. 277, 296 (1992); 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 14.06, at 423-424 (1992); 1 Sand, *supra*, ¶ 6.05, at 6-37 (Instruction 6-11).[4] A similar inference is permitted in civil cases. See 2 John H. Wigmore, *Evidence in Trials at Common Law* § 278(2), at 133 (Chadbourn rev. 1979) ("a party's falsehood * * * in the preparation and presentation of his cause * * * is receivable against him as an indication of his consciousness that his case is a weak or unfounded one"). And a jury may infer that testimony or evidence is unfavorable if the party who has the power to produce it fails to do so. See *id.* § 291, at 228; *Graves* v. *United States*, 150 U.S. 118, 121 (1893).

Even if the jury does not believe that the employer is deliberately dissembling, the jury's rejection of the proffered reason will often reasonably strengthen the jury's belief that discrimination was the true motivation. As we have explained, the prima facie proof makes discrimination a likely explanation for the employer's action. See pp. 12, 15-16, *supra*. And the em-

[3] Not all courts and commentators agree with the view expressed in 21 Wright, *supra*, § 5122, at 572, that "rebutting evidence does not completely dissipate the presumption." Some contend that Rule 301 codifies the "bursting bubble" approach to presumptions, one of several competing approaches at common law. See 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 71, at 335 (2d ed. 1994). Under that approach, the presumption completely disappears once the opposing party introduces evidence that, if believed, disproves the presumed fact. Nonetheless, if "the natural probative force of the basic facts is sufficient to support a finding of the presumed fact," the trier of fact may still be instructed that it may infer the presumed fact. *Ibid.* See also Gregory P. Joseph et al., *Evidence in America: The Federal Rules in the States* ch. 8, at 5 (1987) ("Even if the presumption does disappear following rebuttal, nothing in Article III [of the Federal Rules of Evidence] precludes the trier of fact from drawing logical inferences from the evidence.").

[4] Fact finders are likewise permitted to infer consciousness of guilt from flight from the scene of a crime, 1 Devitt, *supra*, § 14.08, at 433; 1 Sand, *supra*, ¶ 6.05, at 6-29 (Instruction 6-9), use of a false name, *id.* at 6-35 (Instruction 6-10), and fabrication of an alibi, *id.* at 6-42 (Instruction 6-12).

ployer, in putting forth its defense, is likely to proffer as an alternative the nondiscriminatory explanation that best accords with the facts. As a result, the proffered explanation and discrimination will usually be the most plausible of the competing explanations for the employer's action. When the jury eliminates the proffered explanation as a possibility, discrimination will therefore normally be the most likely remaining potential explanation.

Thus, in order to have his case presented to the jury, an employee need not ordinarily produce more than prima facie proof of discrimination plus evidence sufficient to support rejection of the explanation offered by the employer. A contrary rule would effectively require the employee to produce either direct proof of discriminatory intent or a greater amount of circumstantial proof than is ordinarily required in civil litigation. And this Court has counseled that neither of those requirements would be appropriate. See *Teamsters*, 431 U.S. at 358 n.44; *Aikens*, 460 U.S. at 714 n.3, 717; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 253 (1989) (plurality opinion).

3. We do not suggest, however, that there can *never* be a case in which an employer will be entitled to judgment as a matter of law even though the employee has made out a prima facie case and produced sufficient evidence for a jury to reject the nondiscriminatory explanation offered by the employer. As the Court explained in *Hicks*, "the ultimate question [remains] discrimination *vel non*." 509 U.S. at 518. Thus, if the evidence conclusively establishes that the employer acted for an unstated, nondiscriminatory reason, then there is no question for the jury to resolve—even if the employer offered a different (and false) explanation for

its action, and the employee presented prima facie proof of discrimination.

That situation could arise if the employer's true nondiscriminatory motivation were revealed by the employee's efforts to disprove the employer's proffered explanation. See *EEOC: Enforcement Guidance on* St. Mary's Honor Center *v.* Hicks, 8 Fair Empl. Prac. Man. (BNA) 405:7175, 405:7179 (Apr. 12, 1994) ("Even before *Hicks*, if evidence relevant to a charge clearly showed that the respondent's articulated reasons for its action were untrue, but that a nondiscriminatory reason not articulated by the respondent was the true motive for the action, 'no cause' would be found.").

Assume, for example, that a 42 year-old employee who worked for an investment company alleges that the company fired him because of his age. The employee presents prima facie proof that he was qualified to do his job and that, after his discharge, his position was filled by someone who was 30 years old, but he produces no other evidence of age discrimination. The company responds that the employee was fired for insubordination after he refused to complete a work assignment. In his effort to show that he properly refused to complete the assignment, the employee shows that he had discovered that the project violated Securities and Exchange Commission (SEC) regulations, called that fact to the attention of the company, and threatened to alert the SEC, whereupon he was fired and instructed to keep his mouth shut if he ever wanted to work in the securities business again. Cf. *Rothmeier* v. *Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996). Based on that evidence, a court could

properly render judgment as a matter of law for the employer on the age discrimination claim.[5]

Such situations will be rare, however, because a court cannot conclude, as a matter of law, that the evidence establishes that the employer acted for an unstated, nondiscriminatory reason unless no reasonable jury could find otherwise. See Fed. R. Civ. P. 50; *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citing *Brady* v. *Southern Ry.*, 320 U.S. 476, 479-480 (1943)). In reaching that conclusion, the court must consider the evidence in the light most favorable to the employee (as the non-moving party), and the court must give the employee the benefit of all justifiable inferences that may be drawn from the evidence. *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 554 (1990); *Liberty Lobby*, 477 U.S. at 255; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). The court generally may not make credibility determinations or weigh the evidence. *Liberty Lobby*, 477 U.S. at 254; *Webb* v. *Illinois Cent. R.R.*, 352 U.S. 512, 515 (1957); *Brady*, 320 U.S. at 479.

Therefore, although the court must review all the evidence, it must disregard any evidence unfavorable to the employee's claim of discrimination if a reasonable jury could disbelieve that evidence. 9A Wright, *supra*, § 2529, at 299. For example, if there is conflicting testimony, the court generally must disregard the testimony favoring the employer. See *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57-60 (1949). And, if evidence is susceptible to two interpretations, the court must reject the

[5] The true nondiscriminatory motive need not be an illegal one. An employer might withhold its true motive not because it is unlawful but because it is embarrassing, such as nepotism or personal animosity, or in order to spare the employee's feelings.

interpretation favorable to the employer and instead accept the interpretation that supports the employee. See *Continental Ore Co.*, 370 U.S. at 701.[6]

Judgment as a matter of law is not appropriate if "reasonable minds could differ as to the import of the

[6] In *Wilkerson*, the Court stated that it "need look only to the evidence and reasonable inferences which tend to support" the non-moving party. 336 U.S. at 57. Some courts have understood that language to mean that a court must always disregard the moving party's evidence. 9A Wright, *supra*, § 2529, at 297-299. Read in context, however, the language in *Wilkerson* means only that a court should not give weight to evidence that is contradicted either directly or inferentially by the non-moving party's evidence. *Id.* at 300-301; Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 949 (1971) (cited in Fed. R. Civ. P. 50, Advisory Committee's Note (1991 Amendment)). Courts review all of the evidence in passing on a motion for summary judgment under Federal Rule of Civil Procedure 56, see, *e.g.*, *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157-159 (1970); and the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law under Rule 50, *Liberty Lobby*, 477 U.S. at 250. Courts likewise review all of the evidence in passing on motions for judgments of acquittal under Federal Rule of Criminal Procedure 29, *Lockhart* v. *Nelson*, 488 U.S. 33, 41-42 (1988); sufficiency-of-the-evidence challenges on direct and collateral review, *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); and review of fact-finding by a district court under Federal Rule of Civil Procedure 52(a), *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985). For those reasons, and the reasons stated in the text preceding this note, the answer to the second question presented is that, in passing on a motion under Rule 50, a court must review all of the evidence in the light most favorable to the party against whom judgment is sought; and the answer to the third question presented is that the standard for granting judgment as a matter of law under Rule 50 is generally the same as the standard for granting summary judgment under Rule 56.

evidence." *Liberty Lobby*, 477 U.S. at 250. "The fundamental principle is that there must be a minimum of judicial interference with the jury." 9A *Wright*, *supra*, § 2524, at 261; Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev. 903, 921 (1971) (cited in Fed. R. Civ. P. 50, Advisory Committee's Note (1991 Amendment)).

B. Petitioner's Prima Facie Case, Coupled With His Evidence That Respondent Did Not Offer The True Reason For Firing Him, Was Sufficient To Support The Jury's Verdict, Despite The Contrary Evidence On Which The Court Of Appeals Relied

In this case, the court of appeals improperly departed from the "fundamental principle" of minimal judicial interference with the jury. 9A Wright, *supra*, § 2524, at 261. Although petitioner presented prima facie proof of age discrimination and evidence sufficient for a reasonable jury to reject respondent's assertion that it fired petitioner because of poor record keeping, the court of appeals concluded that there was insufficient evidence for a reasonable jury to find, as the jury did here, that respondent fired petitioner because of his age. In so concluding, the court of appeals erroneously failed to consider much of petitioner's evidence, failed to view the evidence in the light most favorable to petitioner and to draw all reasonable inferences in his favor, and substituted its view of the weight of the evidence for the jury's reasonable view.

1. There is no dispute that petitioner presented prima facie proof of age discrimination by establishing that he was 57 years old, qualified for his position as Hinge Room supervisor, discharged, and replaced, on three successive occasions over the next two years, by men in their thirties. Pet. App. 5a-6a & n.11. That

evidence was "proof of actions taken by [respondent] from which [the jury could] infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco*, 438 U.S. at 579-580.

Respondent attempted to counter the inference of discrimination by introducing evidence that it fired petitioner because of errors in recording absences and tardiness of employees under his supervision, errors which respondent claimed cost the company money and exposed it to union grievances. Pet. App. 7a-8a. Petitioner, in turn, introduced a variety of evidence to discredit that explanation. Through cross-examination, he established that the company could not document the amount of any overpaid wages allegedly attributable to his purported errors, see *id.* at 8a; 4 R. 301, and had not received a grievance or complaint arising from them, 4 R. 267. Petitioner testified that he properly recorded the timely arrival of his employees and assigned extra work to any employee who was paid for arriving early or staying late. Pet. App. 8a. He showed that another supervisor, not he, was responsible for the only overpayment that was identified on the day that he was fired. 3 R. 17. And Sanderson agreed with petitioner that he was not responsible for preparing disciplinary write-ups for excessive tardiness or absenteeism. 3 R. 138.

Petitioner also testified that Powe Chesnut, who was married to the company president and was described by another witness as the "absolute power in" the company, 3 R. 80, subjected him to verbal abuse and made remarks indicative of age bias, including that petitioner was "too damn old to do [his] job," 3 R. 26. That treatment was corroborated by the independent testimony

of Joe Oswalt. 3 R. 82-83. Oswalt also testified that Chesnut subjected petitioner to heightened scrutiny and inferior treatment. 3. R. 83. Oswalt's testimony was confirmed by evidence concerning the 1993 efficiency study and consequent discipline of petitioner. Although petitioner and Oswalt had virtually identical productivity rates during that year, see 3 R. 163-167; 4 R. 226, Chesnut directed an efficiency study of only the line supervised by petitioner and recommended only petitioner for probation. Oswalt, who was in his early thirties, was neither studied nor disciplined. 3 R. 166-167; 4 R. 228-229. The court of appeals concluded that, "[b]ased on this evidence, * * * a reasonable jury could have found that [respondent's] explanation for its employment decisions was pretextual." Pet. App. 8a.

That finding, coupled with petitioner's prima facie proof, was also sufficient for the jury "to infer the ultimate fact of intentional discrimination." *Hicks*, 509 U.S. at 511; see also pp. 11-20, *supra*. Indeed, after being properly instructed to find for respondent if petitioner "fail[ed] to prove age was a determinative or motivating factor in [his] discharge," 4 R. 368, the jury returned a verdict for petitioner. Pet App. 4a. The district court denied respondent's motions for judgment as a matter of law. The court of appeals nonetheless held that petitioner "did not introduce sufficient evidence of age discrimination to support the jury's finding of liability." *Id.* at 10a.

2. In rejecting the jury's verdict, the court of appeals improperly invaded the province of the jury. The court did not give sufficient weight to petitioner's prima facie proof and evidence of pretext, and it failed to draw all reasonable inferences in petitioner's favor. Moreover, the countervailing evidence on which the court relied would not have precluded a reasonable jury

from inferring discrimination from petitioner's evidence.

In considering whether there was sufficient evidence of discrimination to support the verdict, the court of appeals erroneously failed to take into account petitioner's prima facie proof, as well as his evidence of pretext, other than Powe Chesnut's age-related comments and the evidence that petitioner was treated less favorably than younger employees. See Pet. App. 8a-10a. As we have explained, the jury was entitled to consider all of that evidence in deciding whether to draw the ultimate inference of discrimination. See pp. 16-20, *supra*.

Moreover, in evaluating the evidence that it did consider, the court of appeals impermissibly substituted its view of the weight of the evidence for the jury's view and failed to draw all reasonable inferences in petitioner's favor. In apparent response to petitioner's evidence that he was singled out for harsher treatment than younger supervisors, the court noted that all of the Hinge Room supervisors—including Oswalt, who was in his thirties—were accused of inaccurate record keeping. See Pet. App. 9a. That fact, however, would not preclude a reasonable jury from inferring age-based animus based on the other evidence of differential treatment. That is particularly so because Oswalt had left his job voluntarily before the audit that revealed the alleged inaccuracies was even conducted, and the jury could have disbelieved Chesnut's testimony that he would have been fired if he had not left voluntarily.

The court of appeals' treatment of Chesnut's age-related comments was particularly improper. The court acknowledged the "potentially damning nature" of the comments, but discounted them because they "were not made in the direct context of [petitioner's] termination"

and Chesnut was "just one of three individuals who recommended to Ms. Sanderson that [petitioner] be terminated." Pet. App. 9a. A reasonable jury, however, could have viewed those remarks as a strong indication that petitioner's termination was based on age discrimination. The comments were directed specifically to petitioner and singled him out based on his age. 3 R. 26. At least one of them was targeted at his job performance and was made just two months before his termination. *Ibid.* And the person who made the comments was said to be "in absolute power" at the company, 3 R. 80, had previously recommended disciplinary action against petitioner, 4 R. 237, ordered the audit that led to petitioner's discharge, Pet. App. 3a, and was married to the person with the ultimate authority to fire petitioner, *id.* at 3a n.1.

Finally, the court of appeals erred in relying on the fact that two of the people who were involved in the decision to fire petitioner and several other of respondent's managers were over the age of 50. See Pet. App. 9a-10a. To the extent that evidence was contradicted by petitioner, see 4 R. 333, the court should have disregarded it. Even if the court properly considered the evidence, the court erred in drawing an inference unfavorable to petitioner from it, because a reasonable jury was not compelled to do so. For example, the jury reasonably could have determined that Chesnut's influence at the company was so strong that the other "decision makers" simply ratified his age-based decision to fire petitioner. Cf. *Anderson* v. *Bessemer City*, 470 U.S. 564, 579-580 (1985) (upholding finding of discrimination based on evidence that two of five members of selection committee had discriminatory animus).

Even if a reasonable jury necessarily would have concluded that the age of the other managers made it

somewhat less likely that respondent discriminated against petitioner, a reasonable jury would not necessarily have found that conclusion sufficient to overcome the evidence pointing to discrimination. The fact that "at least two of the decision makers were themselves over the age of 50" (Pet. App. 9a) does not conclusively establish that they did not discriminate against petitioner based on his age. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977); see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[N]othing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."). Similarly, although proof that respondent retained other employees in their 50s and 60s in management positions, see Pet. App. 10a, "is not wholly irrelevant on the issue of intent, * * * such proof neither was nor could have been sufficient to *conclusively* demonstrate that [respondent's] actions were not discriminatorily motivated." *Furnco*, 483 U.S. at 580. Because the evidence did not conclusively establish that respondent fired petitioner for a nondiscriminatory reason, respondent was not entitled to judgment as a matter of law.

This Court has repeatedly counseled that neither "trial courts [nor] reviewing courts should treat discrimination differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716; *Hicks*, 509 U.S. at 524. "Conventional rules of civil litigation generally apply in [discrimination] cases." *Price Waterhouse*, 490 U.S. at 253 (plurality opinion). "[O]ne of these rules is that

parties to civil litigation need only prove their case by a preponderance of the evidence." *Ibid.* Another is that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, 477 U.S. at 255. "If reasonable minds could differ as to the import of the evidence," the jury, not the court, must render judgment. *Id.* at 250. The court of appeals disregarded those principles and usurped the jury's role by rendering judgment for respondent in this case.

CONCLUSION

The judgment of the court of appeals should be reversed, and the jury verdict for petitioner should be reinstated.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BARBARA D. UNDERWOOD
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General

C. GREGORY STEWART
General Counsel
PHILLIP B. SKLOVER
Associate General Counsel
VINCENT BLACKWOOD
Assistant General Counsel
DORI K. BERNSTEIN
Attorney
Equal Employment Opportunity Commission

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No. 99-536

In the Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

PAUL W. MOLLICA
Counsel of Record
MEITES, MULDER, BURGER & MOLLICA
208 South LaSalle Street
Suite 1410
Chicago, IL 60604
(312) 263-0272

Attorneys for *Amicus Curiae*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

STATEMENT OF ISSUES PRESENTED

Does a plaintiff who makes out a *prima facie* case of employment discrimination under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), combined with proof that the employer prevaricated about the reasons for its actions, present evidence to support a permissive inference of discrimination that is sufficient to withstand judgment as a matter of law?

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to insure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Kolstad v. American Dental Association*, ___ U.S. ___, 119 S.Ct. ___ (1999); *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *and Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998).

NELA members have brought innumerable cases in the wake of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*") and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517-18 (1993) ("*Hicks*") in which the method and respective burdens of proof for employment

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no person or entity other than the *amicus curiae*, its members, and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored the brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

discrimination cases has been a matter of dispute and confusion. NELA has an interest in the outcome of this case, as the Court's decision will restore clarity to an area often fraught with confusion.

SUMMARY OF ARGUMENT

Amicus requests this Court to restore confidence in a method of proof for employment discrimination cases devised a generation ago by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and ratified several times since. The petitioner, Roger Reeves, rightly complains (cert. pet. at 4-7) that the Fifth Circuit panel applied a heterodox version of the *McDonnell Douglas* inquiry, which allowed it to disregard a genuine issue of material fact about the employer's motivation (App. A at 8a, "a reasonable jury could have found that [employer's] explanation for its employment decisions was pretextual"), in favor of evidence that the panel believed—despite the jury's verdict—exonerated the employer of discrimination. Our members know from hard experience that such judicial pretermission of the jury's role is no longer uncommon.

In Section I, *amicus* reveals that courts in some circuits (the First, Second, Fourth and Fifth Circuits) now substitute their own judgment when weighing (on summary judgment or judgment as a matter of law) whether evidence of pretext supports an inference of discrimination. A majority of circuits—operationally or by express holding—entrust the finders of fact with this determination. Because of this split, practitioners know that judicial receptiveness to their client's cases or defenses is unduly sensitive to the circuit where one appears—and even to the panel one draws on appeal. To bring order to the chaos, the Court should rekindle the *McDonnell Douglas* principle that upon proof of the employer's prevarication, the jury may routinely draw a *permissive* inference of discrimination. This approach would still allow the courts ample latitude to consider summary judgment, or judgment as a matter of law, in appropriate cases. But it would also revoke the license, such as that taken by the Fifth Circuit, to simply draw a different inference than the jury did from the same record.

In Section II, *amicus* observes that the lower courts have spawned a host of counter-inferences or presumptions especially crafted to enable employers to defeat (or short-circuit) the inference of discrimination produced by the customary application of *McDonnell Douglas*. These include the "same actor" inference and the evidentiary category of "stray remarks." These counter-inferences unmistakably help employers—and *never* employees—win their cases. This Court has been forced in recent years to overrule such wanton instances of judicial lawmaking as the denial of same-sex harassment (*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1001 (1998)); the *prima facie* requirement under the ADEA for replacement of the employee from outside the protected age group (*O'Connor v. Consolidated Coin Caterers Co.*, 517 U.S. 308, 311 (1996)); and the after-acquired evidence rule (*McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995)). As this case reveals, a return to first principles is in order: the lower courts need reminding that the anti-discrimination principles of the ADEA, Title VII, Americans with Disabilities Act and other federal statutes are plain and should not be adulterated by such extra-statutory pronouncements.

ARGUMENT

I. SEVERAL CIRCUITS—INCLUDING THE COURT BELOW—DENY JURIES THE OPTION OF INFERRING DISCRIMINATION FROM THE EMPLOYER'S PREVARICATION, AS THIS COURT ALLOWED IN *McDONNELL DOUGLAS*

This Court sanctioned a permissive inference in *McDonnell Douglas* for employment discrimination cases. Once a plaintiff establishes a jury issue about (1) her *prima facie* case of discrimination and (2) the employer's prevarication (or "pretext") concerning its reasons for the adverse employment action, a jury may be allowed to draw an inference of discrimination on her behalf. Experience in some circuits, though, has been that a plaintiff who establishes both predicates may still never get to the jury—or, worse yet, have a jury verdict directed away—because a judge or panel views the record differently. Such decisions warrant this Court's express disapproval.

A. This Court Endorses A Permissive Inference of Discrimination From the Employer's Prevarication, or Pretextual Explanation, About Its Actions Against the Employee

In *McDonnell Douglas*, 411 U.S. at 802, the Court held that a Title VII plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." Following the *prima facie* case, "the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, plaintiff must "be afforded a fair opportunity to show that [the

employer's] stated reason for respondent's rejection was in fact pretext." *Id.* at 804. Such evidence might include "evidence that white employees involved in acts against [the employer] of comparable seriousness to [plaintiff's] were nevertheless retained or rehired. [The employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.*[2]

This Court has often reiterated this standard version of the individual, disparate treatment case. *See, e.g., Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 357-58 (1977); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). As this Court later stated:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

---

[2] "Other evidence that may be relevant to any showing of pretext includes facts as to [employer's] treatment of [plaintiff] during his . . . employment; [employer's] reaction, if any, to [plaintiff's] legitimate civil rights activities; and [employer's] general policy and practice with respect to minority employment. On the latter point, statistics as to [employer's] employment policy and practice may be helpful to a determination of whether [employer's] refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 804-05 (footnote omitted).

Furnco Const. Corp. v. Waters, 438 U.S. 567, 575 (1978) (citations omitted).

In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981), "[t]he narrow question presented [was] whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." The employer had won at trial, but suffered a reversal in the Fifth Circuit, which held that the employer had the burden of *proving* a legitimate, non-discriminatory reason for not hiring plaintiff. The Court held that the employer's burden was solely one of production, with the ultimate burden of proof on the plaintiff. Responding to concern that a mere burden of production gave the employer an opportunity and motive to fudge, the Court held that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext." *Id.* at 258.

The Court clarified the plaintiff's burden on the final step of the *McDonnell Douglas* analysis:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256. *But see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517-18 (1993)

Following *Burdine*, there ensued a split in the circuits about whether an employee was to adduce evidence over and above proof of pretext to support a finding of discrimination.[3] In *Hicks*, *supra*, the Court resolved (in a Title VII racial discharge case) that under the pretext analysis laid out in *McDonnell Douglas*—following the employer's proffer of legitimate, non-discriminatory reasons for its treatment of the plaintiff—"[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon rejection, 'no additional proof of discrimination is required'." *Hicks*, 509 U.S. at 511 (quoting *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992)).

At the same time, the Court overruled the Eighth Circuit's holding in that case that "rejection of the defendant's proffered reasons *compels* judgment for the plaintiff." *Id.* at 511 (emphasis in original). This is because other factors in the record may point away from a finding of discrimination, such as (in Hicks's own case) that African-American employees served on the disciplinary committee, other African-American employees were not punished for the same conduct and "the number of black employees at St. Mary's remained constant." *Id.* at 508 n.2. A fact-finder must be allowed to weigh all of these factors, rather than simply be directed to enter a judgment based on one category of evidence (*i.e.* the employer's prevarication). *See id.* at 513-14 (the Court's hiring hypothetical). Thus, in *Hicks*, the Court knocked out the two extreme poles posited by some of the circuits (a mandatory presumption of discrimination on the

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[3] An account of this debate appears in *Kline v. TVA*, 128 F.3d 337, 342-43 (6th Cir. 1997).

one hand, or the requirement of additional evidence of discrimination on the other), leaving a permissive inference drawn by the trier of fact upon two predicates: the *prima facie* case and rejection of the defendant's proffered reasons.

This case, in material respects, offers us the same dynamic as *Hicks*. In this case, as in *Hicks*, the *prima facie* case was not in dispute (App. A at 6a) and plaintiff Reeves presented evidence that the employer disbelieved its own proffered reasons for terminating him (*id.* at 7a-8a). And in both cases, the courts of appeals erred by placing undue weight on one particular facet of the record. But there is also this salient difference: instead of considering only the evidence *detrimental* to the employer (as the Eighth Circuit did in *Hicks*), the panel below placed determinative weight upon *exonerating* factors (the age of the decision makers and the bottom-line numbers of older employees) (App. A at 7a-10a). Courts of appeals after *Hicks* were supposed to allow triers of fact to draw inferences from the record, but we shall see that the Fifth Circuit and a few other courts do not.

B. A Majority of Circuits Keep Faith With the Permissive Inference Established By *McDonnell Douglas* and Its Progeny

Following *Hicks*, the fulcrum in pretext cases shifted to a different inquiry: how deeply should the courts involve themselves (whether on summary judgment, judgment as a matter of law or on appeal) in determining whether the two predicates—the *prima facie* case and rejection of the defendant's proffered reasons—may support a finding of discrimination. Most courts have continued to reserve this ultimate issue of discrimination to triers of fact. In *Kline v. TVA*, 128 F.3d 337, 342-47 (6th Cir. 1997), the Sixth Circuit confirmed that a plaintiff need only present a *prima facie* case under *McDonnell Douglas* and evidence of the employer's prevarication to raise an inference of discrimination.[4] Plaintiff Kline, a African-American personnel officer for a utility, applied for a transfer to a posted human resources job. The hiring manager had already made up a list of candidates before Kline applied, so (without telling plaintiff) the manager had a subordinate place Kline's "resume in a desk drawer where it remained for the entire selection process and beyond." *Id.* at 339-40. A successor to the hiring manager eventually selected a white applicant (Becker), and Kline soon thereafter lost his job in a reduction in force. This occurred despite evidence that (1) Kline was superior to Becker in experience and education; (2) Kline (but not Becker) was denied an interview; and (3) a draft job description, upon which the manager allegedly made his decision, had been destroyed prior to the selection process. The district court tried this case and held that the process used to choose Becker over Kline did not discriminate by race. But the Sixth Circuit reversed, holding that the district court erred in holding that Kline was required to adduce "direct" evidence of discrimination in addition to proof of the *prima facie* case and pretext. "The import of the *Hicks* decision in this circuit is that once a plaintiff has disproved the reasons offered by the defendant, the factfinder is permitted to infer discrimination." *Id.* at 347.

This same approach has been followed expressly in the Third, Seventh and Ninth Circuits. In *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997), the court

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[4] The Sixth Circuit has adhered to this standard in other cases. *See also Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F.3d 414, 421 (6th Cir.) (affirming jury verdict where primary evidence was proof of flaws in company's ranking policy), *pet. for cert. filed*, 68 U.S.L.W. 3292 (1999); *EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 835 (6th Cir. 1997) ("the law allows a factfinder to infer intentional discrimination from proof of the prima facie case coupled with a disbelief of the proffered reason for the employer's action, but such an inference is not required").

held that a plaintiff need only "cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible," and "once the court is satisfied that the evidence meets this threshold requirement, it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer." Likewise, the Seventh Circuit held in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) that "the plaintiff *may* prevail in a discrimination case by establishing a prima facie case and by showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false."[5] Finally, the Ninth Circuit endorsed this analysis in *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993): "Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment."

[5] *See also Statler v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 291-92 (7th Cir. 1999) (reversing summary judgment where record presented genuine question about whether store uniformly terminated employees guilty of "gross misconduct" under company policy, combined with fact that employer arguably changed its reasons for terminating plaintiff over the course of the litigation); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir.1999) (noting that *Hicks* decision rejected pretext-plus standard); *Janiuk v. TCG/Trump Co.*, 157 F.3d 504, 508-09 (7th Cir. 1998) (in ADEA discharge case, plaintiff produced organization chart showing that his job was filled by another, younger employee; chart established both an element of the plaintiff's prima facie case that he was replaced by a younger person, and pretext by revealing as false the reason given for his discharge); *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 681 (7th Cir. 1996) ("[i]mplicit in the Court's holding [in *Hicks*] is the notion that, once the employee has cast doubt on the employer's proffered reasons for the discharge, the issue of whether the employer discriminated against the plaintiff is to be determined by the jury not the court"); *Perdomo v. Browner*, 67 F.3d 140, 144 (7th Cir. 1995) (disbelief of the employer's reasons was sufficient by itself to raise a triable issue of fact).

The Tenth Circuit also recently sided with the straight pretext approach of the above courts. In *Beaird v. Seagate Technology Inc.*, 145 F.3d 1159 (10th Cir.), *cert. denied*, 119 S. Ct. 617 (1998). The panel majority held, in substantially reversing summary judgment for seven plaintiffs, that a plaintiff may "resist summary judgment if she can present evidence that [the employer's] proffered reason was pretextual, 'i.e. unworthy of belief,' see *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995), or otherwise introduces evidence of illegal motive" (footnote omitted). *See also Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994) (at the summary judgment stage, "if a plaintiff advances evidence establishing a prima facie case and evidence upon which a factfinder could conclude that the defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the factfinder").

Different panels of the Eleventh Circuit have issued discrepant opinions, but that court appears to have settled upon the majority approach as well. In *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442 (11th Cir. 1996) (*per curiam*), *cert. denied*, 521 U.S. 1119 (1997), the court declared that disbelief of the employer's proffered justifications may not be enough to support a finding of discrimination.[6] But in *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532-33 (11th Cir. 1997), *cert. denied*, 118 S. Ct.

[6] *See also Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998) (relying on and citing to *Isenbergh*); *Walker v. NationsBank of Florida*, 53 F.3d 1548 (11th Cir. 1995) (separate opinions examine the pretext burden under *Hicks*, with the majority adopting a heightened standard of judicial scrutiny).

851 (1998), the court rejected the analysis in *Isenbergh* as dicta and held that a "plaintiff is entitled to survive summary judgment, and judgment as a matter of a law, if there is a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged actions." *Combs* now prevails in the Eleventh Circuit over *Isenbergh*.[7]

Two other circuits—the D.C. and Eighth—while noting that proof of pretext alone may not be sufficient in some cases to support of finding of discrimination, continue in operation to entrust that determination to the jury. In *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998), the *en banc* court declined to interpret *Hicks* categorically either to compel or to eschew presentation of additional evidence (besides the untruthfulness of the employer's reasons) to prove discrimination.

> "We ourselves do not read *Hicks* to say that a plaintiff who creates a genuine issue of material fact as to whether the employer has given the real reason for its employment decision will *always* be deemed to have presented enough evidence to survive summary judgment. Instead, the court must consider all the evidence in its full context in deciding whether the plaintiff has met his burden of showing that a reasonable jury could conclude that he had suffered discrimination and accordingly summary judgment is inappropriate. Under *Hicks* and other applicable law, however, a plaintiff's

[7] *See, e.g., Bogle v. Orange Co. Bd. of County Comm'rs*, 162 F.3d 653, 658 (11th Cir. 1998) (*Combs* "expressly rejected the suggestion, that had appeared in at least two of our prior decisions, that a defendant could succeed on a motion for summary judgment or a motion for judgment as a matter of law even though the plaintiff had plausibly discredited the defendant's proffered legitimate, nondiscriminatory reasons"); *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998); *Arrington v. Cobb County*, 139 F.3d 865, 871 (11th Cir. 1998); *Evans v. McClain of Georgia*, 131 F.3d 957, 963 (11th Cir. 1997) (*per curiam*); *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1004 (11th Cir. 1997) (*per curiam*); *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997).

> discrediting of an employer's stated reason for its employment decision is entitled to considerable weight."

Id. at 1290. "[W]e do not endorse a reading of *Hicks* under which employment discrimination plaintiffs are presumptively required to submit evidence over and above such a rebuttal [of the employer's non-discriminatory reasons] in order to avoid summary judgment." *Id.* at 1292.

The facts in *Aka* illustrate that an employee can present a triable issue of fact about discrimination by relying primarily on the employer's prevarications. The employee, a hospital orderly who sought promotion to a Central Pharmacy Technician position, claimed violations of the ADEA and ADA. The *en banc* court reversed summary judgment. On the plaintiff's failure to promote claims under both statutes, the court found that disputed issues of fact existed about the plaintiff's qualifications for the job (*e.g.*, pharmacy experience, background in terminology used by doctors, training, degree of "enthusiasm") versus those of the candidate who was hired. In particular, regarding "enthusiasm," the court held that such a subjective qualification could be a legitimate, non-discriminatory reason for making a hiring decision, but that the plaintiff presented a genuine issue of material fact about his own "enthusiasm" via his own affidavit opposing summary judgment and that there was an absence of contemporaneous documentation by manager about the plaintiff's enthusiasm. In addition, the court credited other record evidence pointing to discrimination (*e.g.*, the hiring manager claimed an "aversion" to the plaintiff after the interview, and may have fabricated an "admission" by the plaintiff that he did not want the job).

The governing precedent in the Eighth Circuit is *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir.) (*en banc*), *cert. denied*, 521 U.S. 1119 (1997), also an employer's appeal of a jury verdict and a Rule 50 motion. The majority opinion addressed the *Hicks* standard as follows:

> "In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no

> longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. Furthermore, as the *Hicks* Court explained, the plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination."

Id. at 837-38 (footnotes omitted). The court noted that judgment as a matter of law might be appropriate, for instance, "where the evidence of pretext is inconsistent with an inference of intentional discrimination." *Id.* at 837 n.2.

Notwithstanding this language in *Ryther*, panels of the Eighth Circuit resist applying a pure pretext-plus standard. In *Keathley v. Ameritech Corp.*, 187 F.3d 915, 924 (8th Cir. 1999), an ADEA termination case, the panel reversed summary judgment, finding "most significant . . . evidence suggesting that Ameritech's stated reason for firing Keathley was a sham." And in *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484 (8th Cir. 1998), the court again reversed summary judgment in a Title VII termination case, based on evidence that the employer (a hospital) disciplined similarly situated female nurses less severely than the plaintiff for conduct that was more egregious than his. The panel observed that "the evidence Lynn presented was not inconsistent with the finding of [discrimination]; rather, it tended to show that [the hospital's] proffered reasons were flimsy, and thus susceptible of disbelief. Once a gender-discrimination plaintiff has done as much as Lynn, a jury may (but need not) find for him." *Cf. Stanback v. Best Diversified Products, Inc.*, 180 F.3d 903 (8th Cir. 1999) (separate opinions discuss whether *Ryther* demands proof of "pretext-plus").

C. A Minority of Circuits Allow Roving Judicial Review of the Ultimate Finding of Discrimination

In contrast with the above courts, four other circuits—the First, Second, Fourth and Fifth—positively hold that courts shall decide as a matter of law whether proof of prevarication supports a finding of discrimination. Each of these circuits formally bifurcates the third step of *McDonnell Douglas* into separate inquiries, as the court did below: "To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." (App. A. at 6a.) This leads to cases where plaintiffs avowedly present a genuine issue about the veracity of the employers' proffered reasons, but the courts find such evidence insufficient to support liability.

The Fifth Circuit, in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), held that under the ADEA, "a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." *Id.* at 994. Applying this framework to a Title VII case, the Fifth Circuit tossed out a jury verdict for plaintiff in *Baltazor v. Holmes*, 162 F.3d 368 (5th Cir. 1998), and rendered a judgment in favor of the employer. Plaintiff, a white female clerical employee of the Orleans Parish School Board, claimed that the Board transferred her into a new title at lower pay than her male predecessor, an inequity then perpetuated by an African-American associate superintendent. A jury awarded $325,000.00 in compensatory and punitive damages against the Board and the superintendent, and the district court denied a judgment as a matter of law, holding that "'[t]he jury heard credible evidence of the job responsibilities

competently assumed by plaintiff, the position perceived by others, her request for reclassification, the racial hostility extant within the school administration and the school board's proffered reasons for refusing to take action on the matter.'" *Id.* at 374 (quoting the district court's ruling). Yet while the Fifth Circuit noted a "legitimate controversy over proper compensation and application of the procedures of reclassifying Baltazor's position," *id.*, it still held as a matter of law that the failure to upgrade plaintiff's title and salary was motivated neither by race nor gender.

Likewise, in *Travis v. Board of Regents*, 122 F.3d 259 (5th Cir. 1997), *cert denied*, 522 U.S. 1148 (1998), the Fifth Circuit held that the district court erred in denying judgment as a matter of law in favor of the employer. The plaintiff, an associate professor, alleged (among other things) that her denial of a promotion to full professor violated Title VII. The jury found that the failure to promote her was motivated by gender, and the judge awarded her retroactive promotion, and front and back pay. On appeal, however, the Fifth Circuit threw out the verdict, despite finding that there was a "legitimate controversy over the quality and importance of Travis's research" and that "a reasonable jury could have even concluded that the adequacy of Travis's research was not the real reason that the university twice denied her promotion." *Id.* at 264.

The Fourth Circuit, like the Fifth Circuit, insists upon separate inquiries into pretext and discrimination. In its most recent *en banc* decision, *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 230 (4th Cir. 1999), the court stated that "[t]o meet her burden of proving pretext, a plaintiff must prove both that the reason given for the adverse action by the employer was false, and that discrimination was the real reason." *See also Vaughan v. The Metrahealth Companies, Inc.*, 145 F.3d 197 (4th Cir. 1998) ("[e]ven where an employer's explanation for taking action is disputed or disproved, a discrimination plaintiff must come forward with sufficient evidence that she was the victim of

illegal discrimination before her case can go to the jury [citing *Hicks*]"). The Fourth Circuit frankly christened its approach as "pretext-plus." *Gillins v. Berkeley Elec. Coop., Inc.*, 148 F.3d 413 (4th Cir. 1998) ("[t]his court has adopted what is best described as the 'pretext-plus' standard for summary judgment in employment discrimination cases").

Thus, as in the Fifth Circuit, the Fourth Circuit has held in some cases as a matter of law that a genuine issue of material fact about pretext nonetheless failed to raise an inference of discrimination. In *Gillins*, 148 F.3d at 417, a Title VII racial demotion claim, the court affirmed summary judgment. Despite the fact that the plaintiff presented a triable issue of fact over whether the reasons given for not demoting two white incumbents were false, the court held that the claim failed because the plaintiff failed to advance additional evidence that his demotion was motivated by race. Also in *Vaughan*, 145 F.3d at 201, summary judgment was affirmed in an ADEA termination case, notwithstanding the district court (and court of appeals) finding that the plaintiff established a "genuine dispute over the credibility of the employer's proffered justification" (*i.e.*, compliance with a uniform "Downsizing Manual").

Like the above circuits, the Second Circuit held in *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 (1998)—by an opinion joined fully by only six of the court's eleven judges—that a finding of pretext alone (in this case, by a judge following a bench trial) will not insulate a judgment from appellate review under a clearly erroneous standard. The majority wrote that a plaintiff "may prevail only if an employer's proffered reasons are shown to be pretext *for discrimination*, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction or both. . . We have recognized again and again that a plaintiff does not necessarily satisfy the ultimate burden of showing intentional discrimination by showing pretext alone. A finding of pretext may advance the plaintiff's case,

but a plaintiff cannot prevail without establishing intentional discrimination by a preponderance of the evidence." *Id.* at 1339 (footnote omitted). In line with its *Fisher* decision, the Second Circuit in *Belfi v. Prendergast*, 191 F.3d 129, 140 (2d Cir. 1999), affirmed summary judgment in a Title VII compensation case, despite allowing that the plaintiff had established that her employer's explanations for disparate salaries was pretextual. "[I]nconsistent and pretextual explanations do not constitute proof that the [employer] intended to discriminate against plaintiff because she was a woman. Absent that proof, a jury could not simply infer a discriminatory intent."[8]

Finally, the First Circuit held in *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994), that plaintiffs must not only present "'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus. . . . Thus, the plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer." *Accord Carey v. Mt. Desert Island Hosp.*, 156 F.3d 31, 34 (1st Cir. 1998); *Dichner v. Liberty Travel*, 141 F.3d 24, 30 (1st Cir. 1998) (referring to federal standard of proof as "pretext plus"). The First Circuit has gone as far as to say that "not only is a jury not required to infer discrimination from a showing of pretext together with the evidence underlying the prima facie case, *but the facts will often not*

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[8] Yet *Fisher* has not proven incompatible with a pretext-only analysis. *See, e.g., Banks v. The Travellers Companies*, 180 F.3d 358, 367-68 (2d Cir. 1999) (noting a 22-year gap in ages between candidates for discharge in ADEA case, a jury could have found that age motivated the termination because the "record appears to be devoid of any consideration other than the wide age discrepancy"); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 762 (2d Cir. 1998) (reversing summary judgment where plaintiff in a Title VII retaliation case raised factual issues about the asserted reasons for her discharge).

permit a jury to do so." Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co., 152 F.3d 17, 25 (1st Cir. 1998) (emphasis added), *cert. denied*, 119 S. Ct. 1778 (1999).

The plaintiff in *Alvarez-Fonseca*, a line supervisor at a bottling plant, claimed that he was terminated because of age. Plaintiff (age 54) argued with his manager (age 39), who called him "senile." A fistfight broke out between the men. In response, the company terminated plaintiff but merely suspended the manager for 30 days. A jury found that plaintiff's termination violated the ADEA and awarded $73,373.39 in back pay. On appeal, however, the verdict was annulled. The court allowed that "[a] jury could have disbelieved Pepsi's claim that its workplace rules required dismissal of an employee who initiated a fight in all cases," and thus "could question Pepsi's credibility." *Id.* at 25. Despite this, the court held that the plaintiff was unable to show that the real reason for his termination was his age, rather than violation of work rules. We note, however, that the First Circuit recently took a step away from the brink in *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999). There, the court reversed summary judgment in an title VII race case claiming discriminatory discipline and termination. It stated in a very comprehensive opinion that "[b]ecause discrimination, and discrimination cases, come in many different forms, a case-by-case analysis is always necessary. There can be no rigid requirement that plaintiffs introduce a separate 'plus' factor, such as a negative employer comment about the plaintiff's protected class, in order to prove discrimination. Otherwise, the *McDonnell Douglas/Burdine* framework would no longer serve the purpose for which it was designed: allowing plaintiffs to prove discrimination by circumstantial evidence." *Id.* at 57.

D. The Majority Approach Obeys this Court's Pronouncements, the Seventh Amendment Reexamination Clause, and Sensible Judicial Process

There are several reasons why the approach of these errant circuits must be rejected. First, it flies in the face of

this Court's pronouncements, unbroken from *McDonnell Douglas* to *Hicks*, that the finder of fact is entrusted to weigh all of the relevant factors. *Aikens*, 460 U.S. at 716 (1983) (the trier of fact "must decide which party's explanation of the employer's motivation it believes"). The minority circuit's approach is also out-of-sync with this Court's holding that an employer's failure to meet its burden of production under *McDonnell Douglas* mandates entry of judgment for the plaintiff. *O'Connor v. Consolidated Coin Caterers Co.*, 517 U.S. 308, 311 (1996); *Hicks*, 509 U.S. at 509-10 and n.3. Accordingly, the proffer of an indefensible or vacuous excuse by the employer against the backdrop of the *prima facie* case warrants at least a permissive inference of discrimination.[9] Pretext-plus also abrades the Seventh Amendment's Reexamination Clause, which provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. *See generally Hetzel v. Prince William County, Va.*, 523 U.S. 208 (1998) (*per curiam*). While Congress has never taken a step to alter this Court's *McDonnell Douglas* order of proof, it has expressly provided

[9] *See, e.g., Chapman v. AI Transport*, 180 F.3d 1244, 1250 (11th Cir. 1999) (reversing summary judgment; "we are mindful that the 'poor interview' justification, without more, can provide a defendant-employer with a convenient smokescreen for precisely the type of discrimination that the ADEA was intended to eradicate, with virtually no provable recourse for the plaintiff"); *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484, 489 (8th Cir.1998) (where distinctions between male and female nurses for discipline proved "flimsy," this was sufficient to warrant a trial); *Widoe v. District No. 111 Otoe County School*, 147 F.3d 726, 730 (8th Cir. 1998) ("while defendant is certainly entitled to rely at trial on evidence that its employment decision was based upon legitimate subjective criteria and subjective impressions that were free of any discriminatory animus, there is genuine controversy at this summary judgment stage as to whether age was not a factor in the application of such subjective criteria or the formation of such subjective impressions").

for jury trials in Title VII, ADA and ADEA cases. *See* 29 U.S.C. § 626(c)(2); 42 U.S.C. § 1981a(c). Pretext-plus, as revealed by this case, is little more than shorthand for judicial reexamination of the fact-sensitive question of an employer's intent that Congress entrusted to juries.

Finally, the minority circuits display a nagging disregard for sensible judicial process. Pretext-plus heedlessly cuts the finding of discrimination from its moorings, leading to standardless review. The courts have been downright evasive in describing how pretext-plus is supposed to work. *See, e.g., Alvarez-Fonseca*, 152 F.3d at 24-5 ("[a]lthough the plaintiff must then prove both that the defendant's explanation is false, and that the real reason behind the defendant's actions was discriminatory animus, it will not always be necessary for the plaintiff to present additional evidence of discrimination beyond that necessary to prove that the proffered reasons are pretextual"); *Travis*, 122 F.3d at 263 ("it is possible for a plaintiff's evidence to permit a tenuous inference of pretext and, by extension, discrimination, and yet for the evidence to be insufficient as a matter of law to support a finding of discrimination"); *Fisher*, 114 F.3d at 1347 ("[w]hen a court comes to consider . . . whether the evidence can support a verdict of discrimination, no special rules affect the weight to be given to the prima facie case, the truthfulness or falsity of the employer's explanation, or any other piece of evidence").[10] These vaporous guidelines invite the judge to resort to his own proclivities, an unwholesome alternative to the comparative certitude of *McDonnell Douglas*, *Burdine*, and *Hicks*. BENJAMIN

[10] It is no answer, as courts sometimes suggest, that "the fact that the employer is hiding something does not necessarily mean that the hidden something is discrimination." *Fisher*, 114 F.3d at 1346. Such a suggestion is a perfectly suitable point for a trier of fact to consider, and a defendant to make in closing argument, but it hardly justifies giving appellate courts a second crack at the record.

CARDOZO, THE NATURE OF THE JUDICIAL PROCESS at 144 (1921)

> ("[t]he judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'").

The majority approach by contrast respects both the utility and limits of summary judgment, and judgment as a matter of law, in employment discrimination cases. In those circuits, one finds many such decisions reported. But the majority circuits reserve such review for cases where plaintiffs—in defiance of *Hicks*—virtually fail to confront the non-discriminatory explanations of the employer's actions *or* to proffer alternative evidence establishing bias. For instance, in *Diettrich v. Northwest Airlines, Inc.*, 168 F.3d 961 (7th Cir.), *cert. denied*, 120 S. Ct. 48 (1999), an ADEA failure to rehire case, the Seventh Circuit directed a judgment for the employer. Diettrich, an 53-year-old account manager, was not rehired based on an interview with a regional director. The airline based its decision upon a scoring system, based on past performance and an interview. While the plaintiff was asked different questions than other candidates during the interview, there was no evidence that this was because of age. Moreover, that the youngest among twelve candidates received the highest scores and older candidates the lowest scores was determined not to support an inference of age animus: the numbers lacked statistical significance, it was conceded that the interviewer did not know the ages of the candidates, applicants close to plaintiff's age got jobs, and there were enough jobs for all candidates (so the interviewer had no motive to skew results to younger candidates). A failure

to respond to these facts with any precision, in the absence of prevarication, warranted reversal of the jury's verdict.[11] This Seventh Circuit reversal is a far cry from the present case, however, where the record before the Fifth Circuit reflects jury issues on both the prima facie case and the employer's non-discriminatory explanation.

There also arise occasions where a judgment for an *employer* must be vacated. In *Kidd v. Illinois State Police*, 167 F.3d 1084 (7th Cir. 1999), the district court (as trier of fact) erred by relying on an employer's internally inconsistent explanations to justify its racially disparate treatment of its employees. Plaintiff Kidd, an African-American probationary state trooper, alleged that he was terminated in violation of Title VII for alleged deficiencies in communications skills. While not denying that his score was low in this area, plaintiff established that a white probationary officer with the same problems was given training and opportunities to correct his performance, while the department waited six months to address plaintiff's problems. The district court found that the department's explanation for differential treatment—that the white officer was singled out for training because his communications deficiencies were "more easily discerned"—was not pretextual and that the employees were not similarly situated in terms of their

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[11] Another situation where judgment as a matter of law or summary judgment might be appropriate may be "where the evidence of pretext is [itself] inconsistent with an inference of intentional discrimination," thus contradicting the inference raised by the *prima facie* case. *Ryther*, 108 F.3d at 837 n.2. Such cases essentially amount to concessions by the plaintiff that the motivating reason was some factor *other* than invidious discrimination. *See, e.g., Brandt v. Shop 'n Save Warehouse Foods, Inc.*, 108 F.3d 935, 938 (8th Cir. 1997) (evidence of "pretext" pointed to personal favoritism, rather than sex discrimination), *cert. denied*, 522 U.S. 1075 (1998); *Visser v. Packer Eng'g Assoc.*, 924 F.3d 655, 657 (7th Cir. 1991) (*en banc*) (on summary judgment record, evidence of "pretext" pointed to plaintiff's disloyalty to CEO, not age discrimination).

apparent need for remedial intervention. On appeal, the Seventh Circuit held that this finding stood in significant conflict to the record, including examination of the officers' writing samples, their grades at the academy for writing, the fact that both officers as cadets initially failed to pass at the academy, and admission that plaintiff's shortcomings were commonplace and subject to correction. The district court was directed to review and reopen the record to iron out these inconsistencies. *See also Kline v. TVA*, 128 F.3d 337, 352 (6th Cir. 1997) (findings of fact regarding pretext reversed because they were based on "contradictory and evasive testimony").

In sum, *amicus* encourages the Court to revive the principle that the jury decides, upon a trial on the merits, whether evidence of pretext is enough to support a finding of discrimination.

II. SOME COURTS APPLY LOGICALLY DUBIOUS COUNTER-INFERENCES TO GRANT SUMMARY JUDGMENT AND REWEIGH JURY VERDICTS

This Court has previously cautioned lower courts against erecting extra-statutory presumptions in employment cases, especially those touching on the motivations of the employer. For instance, "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *Castaneda v. Partida*, 430 U.S. 482, 499 (1977). Thus, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1003 (1998), this Court unanimously rejected a presumption under Title VII that men could not sexually harass other men in the workplace. The Court stated that "in the related context of racial discrimination in the workplace we have rejected any *conclusive presumption* that an employer will not discriminate against members of his own race." *Id.* at 1001 (emphasis added).

Skepticism of such extra-statutory presumptions and shortcuts has been a leitmotif of this Court's recent employment discrimination jurisprudence. *See, e.g., O'Connor v. Consolidated Coin Caterers Co.*, 517 U.S. 308, 311 (1996) (rejecting conclusive presumption that ADEA plaintiff replaced by another employee age 40 or over cannot prove age discrimination); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995) (rejecting conclusive presumption that employee who committed terminable offense, undiscovered by employer prior to litigation, cannot prove liability under ADEA); *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993) (rejecting conclusive presumption that harassment had to lead to diagnosable psychological injury before it was severe enough to be actionable under Title VII); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (rejecting argument that because there was no evidence of racial animus by union in failure to process grievances of racial discrimination, there could be no Title VII liability).

The Court's decisions often recognize that the unadorned statutory language and purpose of Title VII and kindred statutes, like the ADEA, do not carry the kind of freight—in the form of evidentiary presumptions—that lower courts too often place on them. These statutes are to be interpreted broadly to effectuate the Congressional purpose of ridding interstate commerce of invidious discrimination. *Oncale*, 118 S. Ct. at 1002 ("[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII"); *McKennon*, 513 U.S. at 357 (ADEA must be interpreted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions"). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (in the face of doubt about the meaning of Title VII, we look to "the broader context of Title VII" to resolve ambiguities).

After all, the question posed in disparate treatment cases is fundamentally a simple one: whether the trier of fact credits the employer's or employee's version of the reasons for alleged disparate treatment. This Court stated in *Cooper*, 467 U.S. at 874:

> The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff regarding the particular employment decision "remains at all times with the plaintiff," [*Burdine*, 450 U.S. at 253], and in the final analysis the trier of fact "must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716, 103 S.Ct. at 1482.

The Court commended this analysis to the trier of fact. *Aikens*, 460 U.S. at 714 n.3 ("[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves"). This is because:

> the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof," *Burdine*, *supra*, at 252, 101 S.Ct., at 1093, in deciding this ultimate question.

Id. at 716. The analysis of the ultimate question should not be befouled or misdirected by judicial presumptions. Just how uncomplicated this analysis can be is illustrated by the model jury instruction Judge Easterbrook devised in *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995): "you must decide whether the employer would have fired [demoted, laid off] the

employee if the employee had been younger than 40 and everything else remained the same."

Yet in spite of the admonitions of this Court, some lower courts continue to formulate and apply straitjacketing presumptions and inferences to evaluate the ultimate question of discrimination. Appellate opinions have increasingly come to resemble decision-trees, assaying each piece of evidence with a bank of stereotyping tests. The decision below displays some of these unfortunate tendencies. The *amicus* brief filed by the AARP addresses two such tests—"stray remarks" and whether the decision-maker was in the protected group—and we adopt its analysis on these points. A cousin to this argument that has taken hold in a number of circuits, is the so-called "same actor" inference. It is a virtual laboratory for the muddle caused by presumptions.

Some courts recite a "same actor" inference that a decision maker who hired or promoted an employee in the first instance would not typically harbor a discriminatory animus against the same employee later on (at least over a short enough period). Some decisions accord this inference strong weight,[12] while others consider it an issue for the

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[12] *See, e.g., Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996) ("where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive"); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996) ("[t]his 'same actor' inference has been accepted by several other circuit courts, and we now express our approval"); *EEOC v. Our Lady of Resurrection Med. Center*, 77 F.3d 145, 151 (7th Cir. 1996) ("[t]he same hirer/firer inference has strong presumptive value"); *Buhrmaster v. Overnight Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995), *cert. denied*, 516 U.S. 1078 (1996); *Lowe v. J. B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992); *Proud v. Stone*, 945 F.2d 796, 797-98 (4th Cir. 1991).

finder of fact.[13] But a principled objection could be launched at this entire line of cases: it allows too many exceptions to have any predictive power.

As the court noted in *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 745 (7th Cir. 1999):

> The psychological assumption underlying the same-actor inference may not hold true on the facts of the particular case. For example, a manager might hire a person of a certain race expecting them not to rise to a position in the company where daily contact with the manager would be necessary. Or an employer might hire an employee of a certain gender expecting that person to act, or dress, or talk in a way the employer deems acceptable for that gender and then fire that employee if she fails to comply with the employer's gender stereotypes. Similarly, if an employee were the first African-American hired, an employer might be unaware of his own stereotypical views of African-Americans at the time of hiring. If the employer subsequently discovers he does not wish to work with African-Americans and fires the newly hired employee for this reason, the employee would still have a claim of racial discrimination despite the same-actor inference.

To add but a few more real-life instances, (1) the employer may have been under transitory pressure to add more minority employees (*Fernandes v. Costa Bros. Masonry, Inc.*, ___ F.3d ___, 1999 WL 1252868 (1st Cir. Dec. 29, 1999) (No. 99-1692)); (2) the supervisor might have had little previous contact with minorities (*Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 291 n.3 (7th Cir. 1999)); or (3) other evidence of overt discrimination might simply outweigh the inference (*Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1253 (8th Cir. 1997)). Or perhaps a decision maker was unaware of an employee's protected traits, such as pregnancy or religion. Or the climate at the company might have changed over time, becoming less tolerant of the needs of older or disabled employees.

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[13] *Banks v. The Travellers Companies*, 180 F.3d 358, 367 (2d Cir. 1999) (same-actor inference at most a "commonsensical inference from the facts"); *Swanks v. WMATA*, 179 F.3d 929, 936 n.7 (D.C. Cir.), *cert. denied*, 68 U.S.L.W. 3387 (1999); *Williams v. Vitro Services Corp.*, 144 F.3d 1438, 1442 (11th Cir. 1998); *Waldron v. SL Indus.*, 56 F.3d 491, 497 (3d Cir.1995) ("where . . . the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. But this is simply evidence like any other and should not be accorded any presumptive value").

Amicus urges this Court to remind the courts below not to exalt or characterize special categories of supposedly exculpatory evidence in reviewing summary judgment or a jury verdict.

CONCLUSION

Judge Abner Mikva, late of the U.S. Court of Appeals of the D.C. Circuit, once expressed exasperation with his colleagues about the reversal of a preliminary injunction on appeal. "This case convinces me that we should install a witness stand and a jury box in the courtroom of this court of appeals." *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891, 914 (D.C. Cir. 1988) (Mikva, J., dissenting from the denial of the suggestion to hear the case *en banc*). This lament gives voice to the frustration of many employee-side practitioners (many of whom are members of *amicus*), who witness first hand how some courts routinely weigh facts in employment discrimination cases on summary judgment and after a trial, *always* to the detriment of the employee. It is nothing short of a refusal by those circuits to comply with *Hicks*—and a threadbare revival of the discredited "pretext-plus" rule. To restore the commonsense approach adopted by this Court a generation ago in *McDonnell Douglas*, *amicus* urges that the Court reverse

and remand the Fifth Circuit's decision below with directions to reinstate the jury's verdict and enter judgment for the plaintiff.

Respectfully submitted,

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

PAUL W. MOLLICA
Counsel of Record
MEITES, MULDER,
BURGER & MOLLICA
208 South LaSalle Street
Suite 1410
Chicago, IL 60604
(312) 263-0272

Attorneys for *Amicus Curiae*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ROGER REEVES,

PETITIONER,

vs.

SANDERSON PLUMBING PRODUCTS, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***AMICUS CURIAE* BRIEF SUBMITTED BY THE HISPANIC NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONER'S BRIEF SUPPORTING REVERSAL**

(See inside front cover for list of counsel)

Counsel of Record:
Seth J. Benezra
Attorney for Amicus Curiae
Hispanic National Bar Association
141 Union Boulevard, Suite 260
Lakewood, Colorado 80228
(303)716-0254

Of Counsel:

Luis Perez, General Counsel
Gilbert M. Roman, Deputy General Counsel
Hispanic National Bar Association

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INTEREST OF THE *AMICUS CURIAE*

This Brief is filed pursuant to Rule 37 of the Supreme Court Rules. Consent to file this amicus brief has been granted by counsel for both parties. Letters of consent have been filed with the Clerk of the Court. The Hispanic National Bar Association ("HNBA") monitors trends in the development of the law that may impact the rights of this country's Hispanic community. For example, nativist prejudice against immigrants from Mexico and other regions of Latin America often spills over to a general bias, conscious or subconscious, against anyone who is or looks Latino in origin, particularly in border states. The subconscious or otherwise covert discrimination against Hispanics provides our community with a great interest in the outcome of an appeal that could undermine proof of discrimination through indirect evidence.

Although *Reeves* is being brought under ADEA, there can be no doubt that the decision will be followed by lower courts in Title VII and § 1981 cases raising issues of race and national origin discrimination. Title VII of the Civil Rights Act of 1964 is of critical importance to the Hispanic community. It is of course the law that protects our community against discrimination in employment because of our race and, in some cases, our national origin. The reach of

the *Reeves* decision is therefore of great concern to the Hispanic community. This case goes to the very heart of employment discrimination law in this country as it has the potential to dramatically increase the difficulties of proof in employment discrimination cases. Additionally, Title VII precedents also influence the development of law under 42 U.S.C. § 1981 which is also vitally important to the Hispanic community.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

STATEMENT OF THE CASE

HNBA adopts the Statement of the Case set forth in the Brief of Petitioner Roger Reeves.

SUMMARY OF ARGUMENT

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court adopted a "permissive pretext" approach for analyzing circumstantial evidence cases, because of the recognized difficulty of proving intentional discrimination through circumstantial evidence. The Court of Appeals erred by adopting a "pretext plus" test, which undermines a

plaintiff's ability to prove discrimination through anything but direct evidence.

ARGUMENT

I. UNDER THIS COURT'S DECISION IN ST. MARY'S HONOR CENTER V. HICKS, 509 U.S. 502 (1993), A *PRIMA FACIE* CASE COUPLED WITH A FINDING OF PRETEXT CONSTITUTES SUFFICIENT EVIDENCE TO INFER INTENTIONAL DISCRIMINATION, AND NO DIRECT EVIDENCE OF DISCRIMINATORY INTENT IS REQUIRED

Circumstantial evidence cases are uniquely difficult to prove in employment discrimination cases because many employers have learned to hide their discriminatory motives well. This Court has adopted a "permissive pretext" standard to allow plaintiffs to ferret out discrimination in difficult circumstantial evidence cases. *Hicks*, 509 U.S. at 511. Thus, if a plaintiff can convince the fact finder that the real reason for the employer's pretextual explanation is unspoken discrimination, *Hicks* permits -- though does not compel -- the fact-finder to infer intentional discrimination, and no additional evidence is required. The Court of Appeals decision ignored the holding in *Hicks*.

A. This Court Adopted a "Permissive Pretext" Approach for Analyzing Circumstantial Evidence Cases, Because of the Recognized Difficulty of Proving Intentional Discrimination Through Circumstantial Evidence

Circumstantial evidence cases are, by far, the most common form of discrimination cases brought by plaintiffs. Indeed, as this Court has stated "[t]here will seldom be 'eye witness' testimony as to the employer's mental processes." (*United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Thus, "cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence." *Sheridan v. E. I. DuPont de Nemours & Co.*, 100 F. 3d 1061, 1070 (3rd Cir. 1996) (en banc), *cert. denied*, 521 U.S. 1129 (1997). "This is true in part because... discrimination... is often subtle." (*Id.*) "[A]n employer who knowingly discriminates... may leave no written records revealing the forbidden motive and may communicate orally to no one." (*See La Montagne v. American Convenience Products.*, 750 F. 2d 1405, 1410 (7th Cir. 1984)). This is the backdrop against which this Court issued its decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny.

The method of proof in employment discrimination cases involving circumstantial evidence -- relying on

presumptions and shifting burdens of articulation and production -- arose out of this Court's recognition that direct evidence of an employer's motivation will often be difficult to acquire or is simply unavailable. (*Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J. concurring) (("[T]he entire purpose of the *McDonnell Douglas*[1] *prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.") (Internal quotation marks omitted).

In *McDonnell Douglas*, this Court first pronounced the framework for proving employment discrimination under Title VII. The three-stage *McDonnell Douglas* model requires a plaintiff first to make out a *prima facie* case of employment discrimination. To establish a *prima facie* case, a plaintiff must show that: (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination.

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

McDonnell Douglas, 411 U.S. at 805. The plaintiff who establishes a *prima facie* case creates a rebuttable presumption of discrimination.

The burden of production then shifts to the employer to articulate non-discriminatory reasons for its actions. If the employer meets this requirement, the burden shifts back to the plaintiff to prove that the reasons given by the defendant "were in fact a cover-up" for a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 805. *See also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981).

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court expounded further on the issue of pretext, the third prong of the *McDonnell Douglas* test. *Hicks* held that the factfinder's disbelief of the defendant's proffered reason, together with the elements of the *prima facie* case, does not automatically entitle a plaintiff to prevail under Title VII. However, the trier of fact remains free to conclude, based on such evidence, that intentional discrimination occurred. *Hicks*, 509 U.S. at 511.

One scholar has dubbed this approach the "permissive pretext" standard. "Under this method, if the plaintiff establishes that the defendant's reasons are pretextual the trier of fact is permitted, but is not required, to enter judgment for the plaintiff. This technique allows a

permissive rather than a mandatory determination favoring the plaintiff." (Kenneth R. Davis, *The Stumbling Three-Step, Burden Shifting Approach in Employment Discrimination Cases*, 61 Brooklyn L. Rev. 703, 714-16 (1995).)

Discrimination is often insidious, and it is very difficult to obtain direct evidence of its existence through single overt acts or statements of its perpetrators. The "principal reasons for relying upon circumstantial evidence rather than direct evidence in employment discrimination cases is the virtually unanimous recognition that direct evidence of discriminatory intent is seldom available..." Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 Wash. & Lee L. Rev. 1, 16 (1986).

Unfortunately, despite the passage of civil rights legislation nearly a generation ago, racial and gender stereotyping are still pervasive in both the workplace and society in general. Indeed, perhaps because our society officially opposes bigotry and racism, many individuals outwardly deny discriminatory beliefs, which they in fact subscribe to and act upon. *See generally* Mark Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 Berkeley J. Empl. & Lab. L., 183, 217, (1997). Yet, as Justice Powell

admonished in *McDonnell Douglas*, Title VII "tolerates no racial discrimination, subtle or otherwise." 411 U.S. at 802.

Employers have the best knowledge of, and access to, the true reason for a personnel decision. This makes it both sensible and fair to place on the employer the burden of articulating the non-discriminatory reason in response to the employee's *prima facie* case. This also justifies the inference that the employer's actions that cannot be explained are likely based in impermissible discriminatory factors. As then Justice Rehnquist remarked "we know from our experience that more often than not, people do not act in a totally arbitrary manner, especially in a business setting." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 570 (1978). Justice Rehnquist explained that the plaintiff's *prima facie* case of discrimination properly gives rise to an inference of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.*

B. The Court of Appeals Erred by Adopting a "Pretext-Plus" Additional Evidence Test

The Court of Appeals for the Fifth Circuit adopted a standard different than the standard announced in *Hicks*. The Court of Appeals held:

> To establish pretext, a plaintiff must prove not only that the employer's stated reason for its

> employment decision was false, but also that age discrimination had a determinative influence on the employer's decision-making process.
>
> *****
>
> Because Reeves failed to offer evidence sufficient to prove both that this reason is untrue and that age is what really triggered Reeves' discharge, argues Sanderson, it is entitled to judgment as a matter of law. We agree.

Reeves v. Sanderson Plumbing Products, Inc., 81 FEP Cases (BNA) 609 (5th Cir. 1999).

This requirement of additional proof of discrimination has been described as "pretext-plus." *See Kline v. Tennessee Valley Authority*, 128 F.3d 337, 343 (6th Cir. 1997). The "pretext-plus standard" imposes an additional burden: "The plaintiff must not only demonstrate that the employer's asserted reasons were pretextual, but the plaintiff also must introduce additional evidence of discrimination." *Id.* Based on this test, in this case, the Fifth Circuit deemed insufficient a *prima facie* case of discrimination coupled with evidence of pretext, *because* the petitioner, Reeves, had not introduced *additional* evidence of discrimination.

The Fifth Circuit's "pretext plus" additional evidence test undeniably creates an additional hurdle for a plaintiff to overcome in his or her attempt to establish that something is

a "pretext for discrimination." As a result, if the Fifth Circuit's "pretext plus" analysis is allowed to stand, lower courts will always require something more than a *prima facie* case and proof of pretext for a plaintiff to establish intentional discrimination -- even in close circumstantial evidence cases in which the jury might reasonably find discrimination on the basis of indirect evidence. Although the Court of Appeals does not explain what more is required, it unmistakably suggests that something more will *always* be required to prove discrimination. Faced with less than precise direction about the nature of the required additional proof, lower courts might seize on that language to require direct evidence of discriminatory intent whenever the employer articulates a nondiscriminatory reason, no matter how transparently pretextual. To thus require what amounts to direct proof in these circumstances often imposes an insurmountable burden on plaintiffs with meritorious claims. Moreover, the Fifth Circuit's approach seems to eliminate the possibility that a jury can continue to rely on indirect evidence once the employer articulates a nondiscriminatory reason, however false.

Indeed, *Reeves* well illustrates how requiring additional proof of discriminatory intent can impose an insurmountable burden. Despite showing that the reason for firing Petitioner Reeves was pretextual -- and that one of

three decision-makers made blatantly ageist comments[2] about Reeves just months before the termination decision -- the Court of Appeals still concluded that the evidence was insufficient under the pretext-plus standard.

Reeves demonstrates that, if the "pretext-plus" rule is adopted, it will become virtually impossible for civil rights attorneys to understand what constitutes enough evidence to get the case to the fact-finder. This will detrimentally affect the Hispanic community and all protected groups because civil rights attorneys assume much, if not all, of the risk in these civil rights cases through contingency fee arrangements. If "pretext-plus" becomes the law of the land, civil rights attorneys will decline many meritorious cases because they cannot prevail with circumstantial evidence alone, and because they cannot reliably assess how much

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[2] According to, the *Reeves* Court, statements of discriminatory bias are only relevant if made in the context of the adverse employment action. However, this Court has previously recognized that discriminatory statements evidence both intent and motive to discriminate. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). Of course, discriminatory statements are "often the only proof of defendant's state of mind, and if it were excluded, plaintiff would have no means of proving that the defendants acted with discriminatory intent." *Garvey v. Dickenson College*, 763 F.Supp. 799, 801 (M.D. Pa. 1981), *citing Aikens*, 460 U.S. at 716. Moreover, the *Reeves* Court's analysis runs contrary to this Court's express recognition that age-based stereotyping must be demonstrated to establish a claim of age discrimination. *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1706 (1993) ("It is the very essence of age discrimination for an older employee, to be fired because the employer believes that productivity and competence decline with old age... Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment opportunities on the basis of inaccurate and stigmatizing stereotypes.")

additional evidence is required to survive summary judgment or judgment as a matter of law.

C. The Principal Justifications for the "Pretext-Plus" Standard Lack Merit

The advocates of "pretext-plus" justify their theory for three major reasons. The first is that the "permissive pretext" approach impermissibly shifts the burden of proof to the defendant-employer. The second is that "permissive pretext" interferes with an employer's business judgment. The third is that "permissive pretext" allows a plaintiff to prevail even where the reason for adverse employment action could be an unarticulated non-discriminatory reason. None of these arguments can withstand close scrutiny.

1. The "permissive pretext" approach does not shift the burden of proof away from the employee

"Pretext-plus" advocates claim that allowing proof of intentional discrimination to be inferred from pretext somehow impermissibly shifts the burden of proof from plaintiffs to defendants. Under this view, the defendant has an "almost impossible burden" of disproving its discriminatory motive if the trier of fact does not believe its explanation for its employment decision. *White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984). This contention has no merit.

To begin with, this Court has made it clear that the ultimate burden of persuasion in a discrimination case "remains at all times with the plaintiff". *See Burdine*, 450 U.S. at 253. The defendant is only required to *articulate* non-discriminatory reasons for its decision. "The Defendant need not persuade [the fact-finder] that it was actually motivated by the proffered reasons" *Burdine*, 450 U.S. at 255.

Contrary to the arguments of the adherents of pretext-plus, the permissive pretext approach does not require a defendant to prove a non-discriminatory reason, rather it simply gives a plaintiff the opportunity to submit its case to a jury by establishing both a *prima facie* case and pretext. Since the plaintiff has the burden of proof, if he or she cannot convince the fact-finder that the defendant has lied, the plaintiff will lose. The defendant does not have to persuade the trier of fact that it has not lied in order to prevail. This is not a semantic distinction. Rather, it underscores the difference between the plaintiff's burden of *persuasion* with the defendant's burden of production. *See* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57, 117-122 (1991); *Beck v. QuikTrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983) ("That the trial court believed [plaintiff]'s explanation of

[defendant]'s motivation for her discharge does not mean that it... erroneously shifted the burden of persuasion.")

The notion that the burden of proof shifts to the defendant if a plaintiff demonstrates pretext has no legal support. It is common to draw unfavorable inferences against a party who lies or whose testimony in court is successfully rebutted. Instead, if the fact-finder does not believe a defendant in an employment discrimination case, it may benefit the plaintiff, just as in any civil case. *See* Lanctot, 43 Hastings L.J. at 122.

2. The "permissive pretext" approach does not improperly interfere with an employer's business judgment.

Some "pretext-plus" courts express the concern that permitting plaintiffs to prevail when they successfully rebut defendants' stated justifications will impede employers from exercising business judgment about whom they hire or retain. These courts assert that a plaintiff who disproves an employer's stated reason only shows that the employer made a mistake in assessing the plaintiff's performance or qualifications. Such evidence, the argument goes, does not prove discrimination. *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986). The problem with this line of reasoning is that an employer's discredited explanation all too often is an excuse, or a pretext, for discrimination.

To be sure, an error in business judgment -- if it is nothing more than that -- does not amount to employment discrimination. Even courts that follow the "permissive pretext" rule accept this business judgment doctrine. Lanctot, 43 Hastings L.J. at 122-3. Yet as this Court pointed out in *Burdine*:

> The fact that a court may think that the employer misjudged the qualifications of an applicant does not in itself expose him to... liability, [but] this may be probative of whether the employer's reasons are pretexts for discrimination.

450 U.S. at 259. As one court noted, "Everyone can make a mistake, but if the mistake is large enough, we may begin to wonder whether it was a mistake at all." *Thornbrough v. Columbus G.R..R.*, 760 F.2d 633, 647 (5th Cir. 1985).

Ultimately, whether an employer's articulated reason is a mistake or a cover up for discrimination is a question of fact. "Pretext-plus" advocates apparently do not trust fact-finders to be able to sort out this issue. Yet intent is at the heart of many civil cases. Fact-finders should be permitted to draw the same inferences in discrimination cases.

3. The "pretext-plus" standard is not justified simply because some employers may choose not to articulate reasons for their actions which are nondiscriminatory but

nonetheless illegitimate or embarrassing.

Finally, a common justification for "pretext plus" arises where an employer's stated reason is found to be a lie, but it is allegedly advanced to conceal an unarticulated nondiscriminatory reason. One judge, for example, suggested an employer might offer a pretextual explanation to conceal nepotism rather than discrimination. *Sheridan*, 100 F.3d at 1086 n. 8 (Alito, J., dissenting). Under this rationale, the plaintiff who proves that the employer's articulated reason in pretextual has proven nothing because the personnel decision may still have been made for a concealed reason. *Id.* at 1085. This Court should soundly reject this line of reasoning.

To begin with, this argument is based on a rather cynical premise about a lack of honesty in our judicial system. As the majority in *Sheridan* noted:

> We routinely expect that a party give honest testimony in a court of law; there is no reason to expect less of an employer charged with unlawful discrimination. If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

100 F.3d at 1069. The Third Circuit went on to point out that deliberately hiding the real reason for a personnel decision may violate Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 1070.

The argument based on concealed nondiscriminatory reasons also runs counter to one of the central premises of *McDonnell Douglas* line of cases. The purpose of having the defendant articulate a legitimate, non-discriminatory reason is to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine* 450 U.S. at 255 n.9. Allowing a defendant to refrain from articulating the real reason for the employment action does not narrow, but instead widens, this critical inquiry. It also places on a plaintiff an insurmountable burden of attempting to disprove not only the employer's stated reasons, but somehow identifying and rebutting other unstated, but conceivable reasons. Lanctot, 43 Hastings L.J. at 129-30.

Once again, in other areas of the law, a fact-finder can infer guilt from a party's lack of credibility. Professor Lanctot observes "there is no rational reason for giving a defendant who has lied about the reasons for its actions a presumption that its lie does not conceal illegal conduct." *Id.* at 133. Moreover, just as in cases involving the employer's alleged business judgment, the fact-finder in a discrimination case is always free to conclude that an employer lied but did

not discriminate. "Pretext-plus" adherents, however, would unwisely take away that discretion away from juries and other fact-finders.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals for the Fifth Circuit should be reversed. HNBA asks this Court to reaffirm its "permissive pretext" approach as announced in *Hicks*.

DATED this 5th day of January, 2000.

Respectfully submitted,

By: _____

Seth J. Benezra
Roman, Benezra & Culver, L.L.C.
141 Union Boulevard, Suite 260
Lakewood, CO 80228
303-716-0254

Luis Perez, General Counsel
Gilbert M. Roman, Deputy General Counsel
Hispanic National Bar Association

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2000, a true and correct copy of the foregoing was sent via U.S. Mail correctly addressed to the following:

Taylor B. Smith, Esq.
P.O. Box 1366
Columbus, MS 39703-1366

Jim Waide, Esq.
Waide, Chandler & Flietas, P.A.
P.O. Box 1357
Tupelo, MS 38802

_____

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No. 99-536

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER REEVES

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

THOMAS W. OSBORNE*
LAURIE A. MCCANN
SALLY DUNAWAY
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*

Counsel of Record*

33pp

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No. 99-536

IN THE
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BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonprofit membership organization of more than thirty-three million persons age 50 or older dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. AARP seeks to eliminate ageist stereotypes, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. One-third of AARP's members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*.

[1/] No counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The interpretation and application of the ADEA are of paramount importance not only to AARP, but also to the millions[2/] of older workers who rely on the Act to remedy work place age bias, such as that manifested in this case. Since 1985, AARP has filed more than 200 *amicus curiae* briefs in the federal courts regarding the proper interpretation and application of the ADEA. AARP has participated as *amicus curiae* in several recent cases in this Court which raised ADEA issues including *Oubre v. Entergy Operations, Inc*, 522 U.S. 422 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

This case materially impacts the viability of the congressionally mandated right to a jury trial in age discrimination cases. AARP respectfully submits that the court below misconstrued this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), to substitute its evaluation of the evidence for that of the jury and reject the jury's verdict for Reeves. It did so, as have other courts in a manifestly growing trend, despite the fact that the verdict was based on legally sufficient and exceptionally probative evidence, including a statement by an influential senior executive directly involved in Reeves's termination that he was "too damn old to do the job," demonstrating to the satisfaction of the jury that Sanderson's proffered reasons for its termination of Reeves were a pretext for willful age discrimination.

Where Congress has legislatively provided for a jury trial, courts should only in the rarest of circumstances nullify that right, and then only in accordance with the strict standards established by this Court. Any lesser standard only

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[2/] "As of 1995, approximately 41 million members of the nation's civilian workforce were age 45 or older." Marc Bendick et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, Journal of Aging & Social Policy, Vol. 10(4) 1999, at 20 (citation omitted).

serves to undermine respect for judicial power. It simply cannot be said that no jury could have reasonably determined that Sanderson's actions were motivated by discriminatory animus. Moreover, the reasonableness of the jury's determination was effectively affirmed by the trial court's denial of Sanderson's motion for Judgment as a Matter of Law and its imposition of liquidated damages and award of front pay. Accordingly, the court below's reversal of the jury's finding and its misuse of judicial power is not only an affront to the jury but to the trial court as well. The court below was simply not in a position to fairly second guess the trial court.

Even more than other indicators of the continuing resistance to equal employment opportunity, disparaging epithets, slurs, stereotyping, and derogatory remarks regarding older workers provide a window into the hard-core prejudices which still confront our social, political, and economic institutions.[3/] In view of the Court's acknowledgment of the difficulty of proving discriminatory intent, *see U.S. Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983), discounting the probative value of ageist comments by managers and other senior executives needlessly immunizes some of the worst discriminators from accountability.

Under *McDonnell Douglas*,[4/] Reeves's evidence was sufficient to support the verdict in his favor under even the most restrictive interpretation of *Hicks*. The Court must not

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[3/] One recent study, which found that older job applicants receive less favorable responses from employers than younger applicants 41.2 percent of the time, Bendick, et al., at 6, concluded that it provided "empirical, quantitative confirmation of an uncomfortable truth - that the contemporary American workplace is far from 'age blind.' The consequences of discrimination such as are documented here include not only injustice and economic hardship for individuals but also wastage of human resources and reductions in the nation's productivity." *Id.* at 21 (citation omitted).

[4/] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

countenance this attempt to substitute for *McDonnell Douglas* a sufficiency of the evidence analysis based on counterinferences of questionable validity drawn exclusively in favor of employer-defendants not by the jury, but by the court. It is critical to the effort to fulfill the promise of a discrimination-free work place that *McDonnell Douglas* remain viable for all employment discrimination litigants.

For these reasons, AARP submits this brief *amicus curiae*.[5/]

SUMMARY OF THE ARGUMENT

The court below misapplied the Court's decision in *Hicks*, impermissibly substituting its evaluation of the evidence for that of the factfinder under the guise of a sufficiency of the evidence review. Reeves satisfied all three requirements of *McDonnell Douglas* as construed by *Hicks*. Nevertheless, the court below freely discounted the probative value of Reeves's evidence, including the manifestly age-biased comments of a high corporate executive with extraordinary influence over the decision to fire the fifty-seven year old Reeves after forty years of employment, and inferred from Sanderson's evidence that it did not discriminate against Reeves.

The two comments by Powe Chestnut, Sanderson's Director of Manufacturing, first that Reeves was so old that he "must have come over on the Mayflower," and second that he was "too damn old to do the job," made within two months of his termination, are, along with his other proof, persuasive circumstantial evidence that Sanderson's proffered reason for firing Reeves, "shoddy record-keeping," was a pretext for age discrimination. In overturning the verdict for insufficient evidence, the court impermissibly substituted its evaluation of the evidence for that of the jury, which found not only that

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[5/] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Reeves was fired because of his age, but also that the discrimination was willful.

Due to the strength of his evidence of pretext, including the two ageist comments, the jury's verdict for Reeves must prevail. The Court should, therefore, reverse the judgment of the court below and reject this attempt to substitute its flawed sufficiency of the evidence analysis in place of *McDonnell Douglas*. To do otherwise would fully vindicate Justice Souter's criticism in his dissent in *Hicks* that the Court "abandons th[e] practical [*McDonnell Douglas/Burdine*] framework . . substituting a scheme of proof for disparate-treatment actions that promises to be unfair and unworkable...." *Hicks*, 509 U.S. at 525.

ARGUMENT

I. SINCE REEVES SATISFIED ALL OF THE *McDONNELL DOUGLAS* REQUIREMENTS, THE JURY'S VERDICT MUST STAND.

A. The *Hicks* Standard.

In an attempt to clarify the circumstances in which a plaintiff is entitled to prevail in a disparate treatment case, the Court in *Hicks* construed the requirements of the *McDonnell Douglas* indirect method of proof. The Court pointed out that under *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), at the third stage of the three-part burden-shifting proof paradigm of *McDonnell Douglas*, a plaintiff must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [for the adverse employment action affecting plaintiff] were not its true reasons, but were a pretext for discrimination." *Hicks*, 509 U.S. at 515. The Court held that:

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of

> mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination....

Id. at 511 (emphasis in original). The *Hicks* majority went on to state, however, that "a reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515 (emphasis in original). *Hicks* further cautions that "[i]t is not enough ... to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original). Thus, "[e]ven though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*." *Id.* at 511 n.4 (emphasis in original).

Rather than resolving the problem of when a plaintiff is entitled to prevail, however, *Hicks* added to the confusion surrounding this issue.[6/] In the aftermath of *Hicks*, the lower courts developed two opposing views regarding the quantity and quality of evidence sufficient to support a plaintiff's verdict. First, despite the Court's admonition that if the trier of fact rejects the defendant's proffered reasons "no additional proof of discrimination is *required*," *id.* at 511, many lower courts, including the court below, have construed *Hicks* to

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[6/] *See, e.g., Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997)(*en banc)*, which held that after *Hicks* a finding of discrimination pursuant to *McDonnell Douglas* is reviewable for clear error and which, in five opinions spanning 59 pages, graphically illustrates the struggle of the lower courts to interpret and apply the *Hicks* decision. *See also Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*), in which the court in four separate opinions struggled with the seemingly contradictory language in *Hicks*; the majority concluded that it could simply rely on its traditional sufficiency of the evidence analysis to sustain the jury verdict for plaintiff.

mean precisely the opposite: that even if the jury has found in favor of the plaintiff based on the *prima facie* case and proof of pretext, there must be some additional evidence directly linking the defendant's behavior to the adverse employment decision to support the verdict, the post-*Hicks* "pretext-plus" rule.[7/] Other courts, including the *en banc* Fifth Circuit, hold that the *prima facie* case coupled with the jury's rejection of the defendant's proffered reasons based on plaintiff's proof of pretext are ordinarily sufficient to support a verdict for plaintiff.[8/]

B. The Court Below Failed To Properly Apply *Hicks*.

Even though all three *Hicks* elements, the *prima facie* case, (abundant) evidence of pretext, and a finding of discrimination, are present, the court below nevertheless overturned the verdict for Reeves. The court was wrong to do so. First, Sanderson did not challenge the sufficiency of Reeves's *prima facie* case. *Reeves v. Sanderson Plumbing Products, Inc.*, 81 Fair Empl. Prac. Cases (BNA) 609, 612 (5th Cir. 1999). Second, Reeves proved to the satisfaction of

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[7/] The court below held that "whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." *Reeves v. Sanderson Plumbing Prods. Inc.*, 81 Fair Empl. Prac. Cases (BNA) 609, 612 (5th Cir. 1999). *See, e.g., Vaughan v. Metrahealth Companies, Inc.*, 145 F.3d 197, 202 (4th Cir. 1998); *Fisher v. Vassar College*, 114 F.3d 1332, 1333 (2d Cir. 1997); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994).

[8/] *See, e.g., Rhodes v. Guiberson Oil Tools, Inc.*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*) ("In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence."); *Fuentes v. Perski*, 32 F.3d 759, 764 (3d Cir. 1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994).

the jury that Sanderson's proffered nondiscriminatory reason for firing him, shoddy record-keeping, was a pretext for discrimination. Finally, the jury found not only that Sanderson had discriminated against Reeves, but that the discrimination was willful. *Id.* at 611.

Conceding that Sanderson's explanation for Reeves's termination "may very well be" pretextual, *id.* at 612, the court below nevertheless held that there was insufficient evidence for the jury to find that Reeves was discharged because of his age. Thus, "[d]espite the potentially damning nature of Chesnut's [sic] age-related comments," *id.* at 613, the court below rejected them as insufficient proof of discriminatory intent on the ground that "it is clear that these comments were not made in the *direct* context of Reeves's termination." *Id.* (emphasis added).

Rather, what is clear is that the two comments, both made by Chestnut, the Director of Manufacturing who was directly involved in the decision to terminate Reeves and who was married to the ultimate decisionmaker, Sanderson's president, are extraordinarily probative of discriminatory motive. The first statement, that Reeves was so old that he "must have come over on the Mayflower," was made within months of Reeves's termination; the second statement, that Reeves was "too damn old to do the job," was made within two months of his termination. The first statement is clear circumstantial or "indirect evidence" of discriminatory intent.[2/] The second is the verbal equivalent of the "smoking gun." There can hardly be any stronger circumstantial evidence of on-the-job age bias than a statement made by the boss, to the employee, on the job, within two months of his firing, that he is "too damn old to do the job."

[2/] *See, e.g., Burrell v. Bd. of Trustees of Ga. Military College*, 125 F.3d 1390, 1393 (11th Cir. 1997) (statements by a decisionmaker that are not direct evidence of discrimination may still be used as circumstantial evidence of discriminatory motive.)

C. Reeves's Circumstantial Evidence Is Sufficient To Support A Jury Verdict Under *McDonnell Douglas*.

The Court has acknowledged that the "question facing triers of fact in discrimination cases is both sensitive and difficult" because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Aikens*, 460 U.S. at 716. Similarly, in *Thornbrough v. Columbus and Greenville R. R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985), the Fifth Circuit pointedly stated its awareness of the difficulty of proving age discrimination: "Employers are rarely so cooperative as to ... inform a dismissed employee candidly that he is too old for the job." Yet in this case, where the employer specifically did that, informing Reeves that he was "too damn old to do the job," the Fifth Circuit inexplicably found Reeves's proof of discriminatory intent deficient.

The rejection of plaintiff's ageist comment evidence as insufficiently *direct* to support a verdict pursuant to *McDonnell Douglas* be speaks a fundamental misunderstanding not only of *Hicks*, but also of the probative value of ageist comments.

Chestnut's statement that Reeves was "too damn old to do the job" along with his remark that Reeves was so old that he "must have come over on the Mayflower" was sufficient circumstantial evidence to support the jury's verdict. Based on this evidence alone, the court below should not have granted judgment as a matter of law for Sanderson because "the facts and inferences" do not "point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded" as it did. *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 148 (5th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996).

The Court has said that "the *McDonnell Douglas* formula does not require direct proof of discrimination...." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Further, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial

evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." *Aikens*, 460 U.S., at 714 n.3 (1983). The trier of fact in this case, the jury, did consider all of the evidence and concluded not only that Reeves was the victim of age bias, but that the discrimination was willful.

As explained in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995), "a plaintiff can prove age discrimination in two ways. A plaintiff can prove discriminatory animus by direct evidence or by an indirect or inferential method of proof." Discrimination can be shown indirectly following the "pretext" model of *McDonnell Douglas*. "The shifting burdens . . set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979). If, however, a plaintiff produces direct evidence of discrimination, the *McDonnell Douglas* test is "inapplicable," *Thurston*, 469 U.S. at 121, and plaintiff may proceed under the mixed motives theory of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

The differences between the two methods of proof were summarized in *Mooney*:

> Unlike *McDonnell Douglas*, which simply involves a shifting of the burden of *production*, *Price Waterhouse* involves a shift of the burden of *persuasion* to the defendant. In other words, under *Price Waterhouse*, once a plaintiff presents direct evidence of discrimination, the burden of proof shifts to the employer to show that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails.

54 F.3d at 1216-17 (emphasis in original).

Although direct evidence is required for plaintiff to invoke the much more advantageous *Price Waterhouse* mixed motives analysis, the indirect *McDonnell Douglas* method imposes no such requirement. Indeed, such a requirement would be inconsistent with *McDonnell Douglas* which allows a plaintiff to rely on the inferences the factfinder is permitted to draw from his circumstantial proof. *Hicks*, 509 U.S. at 511. The Fifth Circuit previously has confirmed as much: "*Hicks* does not cast aside circumstantial evidence as a means of allowing a factfinder to infer discrimination." *Rhodes*, 75 F.3d at 993. Rather, to support an inference of discrimination under *McDonnell Douglas*, "the employee must," as Reeves has done here, "provide some evidence, *direct or circumstantial*, to rebut each of the employer's proffered reasons and allow the jury to infer that the employer's explanation was a pretext for discrimination." *Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998) (emphasis added) (citations omitted).

D. Chestnut's Ageist Comments Were Sufficient Indirect Evidence Of Age Discrimination.

Relying on its earlier decision in *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996), the court below stated that ageist comments can be sufficient evidence of discrimination if they are:

> (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to the employment decision. Mere "stray remarks" - i.e., comments which are "vague and remote in time" - however, are insufficient to establish discrimination.

Reeves, at 612.

Notwithstanding that the potentially damning comments here were (1) specifically directed at Reeves, (2) the first just months before his termination and the second,

which directly stated Chestnut's age bias, within two months of his termination, (3) by a senior decisionmaker directly and intimately involved in the termination decision and who had extraordinary power, and despite the fact that the jury inferred that the comments were related to the decision to fire Reeves, the court rejected them as insufficient because "it is clear that these comments were not made in the *direct context* of Reeves's termination." *Id.* (emphasis added). Given Chestnut's status both within the company and as the husband of the company president, his involvement in the termination decision, and the closeness in time of his comments to Reeves's firing, such a finding clearly violates the standard upon which the court purportedly relied.

The fallacious reasoning behind the refusal to assign significant probative value to the ageist comments of Chestnut, and which the court itself characterized as "potentially damning," is reflected in the unsupportable decision of the Fourth Circuit in *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994), in which the court said that "statements about age may well not carry the same animus as those about race and gender." While perhaps true, such a statement vividly demonstrates that the court did not view the evidence in the light most favorable to the nonmoving party (plaintiff). Nonetheless, the *Birkbeck* court concluded that the comment at issue "reflects no more than a fact of life and as such is "merely a truism that carries with it no disparaging undertones." *Id.* (internal quotation marks omitted).

In *Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999), the court further exposed its flawed rationale for discounting ageist comments: "[S]tatements about age, unlike statements about race or gender, do not rest on a we/they dichotomy and therefore do not create the same inference of animus." The court reasoned that "barring unfortunate events, everyone will enter the protected age group at some point in their lives." *Id.* citing *Birkbeck*, 30 F.3d at 512.

It is, of course, true that age discrimination was not born of the same shameful legacy of slavery as is race discrimination. Neither does it have the same harsh antecedents as gender discrimination. Nevertheless, since individuals can age only in one direction - older, the status of "older worker," employed people age 40 and older protected by the ADEA, is based on a dichotomy just as surely as are differences of race and gender. Once attained, the status of older worker is quite as irreversible as one's race, gender, or other characteristic protected by Title VII.[10/] Thus, "while aging is a process of change which is experienced by everyone, the attainment of 'old age' - the condition upon which age discrimination is based - places an individual in a class to which he will always belong."[11/] Further, "[a]ge, like race and gender, is a characteristic that a person has neither chosen nor has the power to change."[12/]

Even if an ageist comment "was not directly related to the adverse employment decision[] (and as such is not, standing alone, direct proof of discrimination), statements of a decisionmaker that are unrelated to the adverse employment decision are nevertheless relevant to the jury's verdict when considered together with other evidence of pretext ...." *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 611 (8th Cir. 1997). Further, the two "damning" comments at issue here are "surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow...." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1058 (8th Cir. 1988).

The decision of the court below in the present case sharply contrasts with its recent decision in *Haas v. ADVO Sys.*, 168 F.3d 732, 733 (5th Cir. 1999), in which the *only* evidence of pretext was the statement to the plaintiff, an

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10/ *See* Howard C. Eglit, Age Discrimination §2.12, at 2-30 (1986).

11/ Note, *Age Discrimination in Employment*, 50 N.Y. L. Rev. 924, 930 n.37 (1975).

12/ Howard C. Eglit, Age Discrimination §1.02, at 1-12 (2d ed. 1994).

unsuccessful job applicant, by an interviewer who was "influential" in the hiring process, that his "only concerns about hiring [Haas] were [his] age." The *Haas* court, relying on the same *Brown* four-part test as the court below, held that the statement should "be viewed as evidence of discrimination as a matter of law." *Id.* at 733-34. There is very little, if any, difference between the comment in *Haas* and Chestnut's statement that Reeves was "too damn old to do the job," yet Chestnut's statement was held to be insufficient.

Contrary to the conclusion of the court below, Chestnut's remarks, like those in *Haas*, appear to satisfy all four of the *Brown* parameters for probative evidence of discrimination. Considering that the speaker was Chestnut, the first comment, that Reeves was so old that he "must have come over on the Mayflower," can be fairly taken to imply that Chestnut believed that age was affecting Reeves's job performance. Moreover, the second, that Reeves was "too damn old to do the job," made directly to Reeves while he was working, within two months of his termination, like the comment in *Haas*, directly states the unlawful discrimination that the ADEA was enacted to combat. Thus, both of Chestnut's comments are exceptionally probative evidence of age discrimination and, along with Reeves's other evidence, are sufficient to support the verdict.[13/]

II. THE COURT BELOW ERRED BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE JURY.

The standard for evaluating a motion for judgment as a matter of law and a motion for summary judgment is the same. *See Celotex Corp. v. Catrett*, 477 U.S. 316, 323 (1986) ("'[T]h[e] standard [for granting summary judgment] mirrors the standard for a [judgment as a matter of law] under

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[13/] *See Beaver v. Rayonier, Inc.*, 196 F.3d 1354 (11th Cir. 1999) (ageist comment coupled with other evidence of discrimination is sufficient to support verdict.)

Federal Rule of Civil Procedure 50(a)....'") *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Rhodes*, 75 F.3d at 993 n.4. The only significant difference between the two is that the record is much more complete post-trial. The Court long ago established that in deciding such motions, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *see Matsushita Elec. Inds. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 572 , 587-88 (1986). In substituting its evaluation of the evidence for that of the jury, the court below violated this rule by crediting Sanderson's evidence and drawing inferences of questionable legal import against Reeves.

In addition to Chestnut's two ageist comments, Reeves introduced other evidence that along with these remarks was sufficient to support the jury's finding that Sanderson's purported nondiscriminatory reason for Reeves's termination, "shoddy record keeping," was, indeed, a pretext for age discrimination.

Reeves established that on several occasions Chestnut referred to him as "old man," (Tr.24, 76), and that he was harassed and "cussed out" by Chestnut, (Tr. 26). Reeves evidence also showed that Sanderson changed its reason for terminating him between the time he was fired and the time of trial. Along with the ageist comments, Reeves' evidence raised not only disbelief, but in the language of *Hicks*, 509 U.S. at 511, "a suspicion of mendacity" regarding Sanderson's stated reasons for the discharge.

Rather than "believ[ing]" Reeves and drawing all "justifiable inferences ... in his favor," *Anderson*, 477 U.S. at 255, the court below concluded:

> Although proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a "red flag" of pretext, the inconsistency noted by Reeves in this case can hardly be considered

> mendacious. Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves's work performance was unsatisfactory. That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie.

Reeves, at 612.

Conceding that on Reeves's evidence "a reasonable jury could have found that Sanderson's explanation for its employment decisions was pretextual," *id.*, the court nevertheless rejected the jury's ultimate finding of discrimination. By crediting Sanderson's evidence instead of that of Reeves and failing to draw inferences clearly supported by that evidence in Reeves's favor, the court below not only transgressed this Court's guidance in *Anderson*, 477 U.S. at 255, but also impermissibly usurped the function of the jury:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Id.

The role of a reviewing court is to determine whether there is an evidentiary basis for the jury's verdict. Long ago, this Court stated that "when that evidentiary basis becomes apparent, it [is] immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). The jury's verdict should be overturned "[o]nly when there is a complete absence of probative facts to support the conclusion reached ...." *Id.* The court is permitted to

intercede only if the record reflects "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Norton v. Sam's Club*, 145 F.3d 114, 118 (2d Cir. 1998). Where, as in this case, there is substantial evidence supporting the jury's verdict, the court of appeals clearly has erred in reversing the verdict for Reeves.

III. THE COURT BELOW RELIED ON SUSPECT PRO-EMPLOYER COUNTERINFERENCES.

In rejecting the jury's verdict that Sanderson fired Reeves because of willful age discrimination, the court relied on counter-inferences of questionable validity, stating that (1) "the record shows that at least two of the decision makers were themselves over the age of 50," and (2) "at the time Reeves was dismissed, 20 of the management positions were filled by people over the age of 50, including several employees in their late 60's." *Reeves*, at 613. Left unstated is the inference (or counterinference, since the facts arise from defendant's proof) that the court obviously drew from each: first, that people in the same protected group as the plaintiff are unlikely to discriminate against members of that group; and second, that a bottom line result reflecting that some members of the protected group did not suffer discrimination shows a lack of motivation to discriminate against the plaintiff.

Not only is each of these counterinferences based on questionable reasoning, they weaken the enforcement of all employment discrimination laws by erecting formidable judicial barriers to a plaintiff's ability to prove his case.

A. Older as Well as Younger Decisionmakers Can Be Infected by Age Bias.

Without articulating its reasoning, the court below relied on the "older decision maker"[14/] doctrine to draw an inference of nondiscrimination because persons making the allegedly discriminatory employment decision are also in the protected age group, *i.e.*, age forty and older. Although it is bereft of logical or sociological support, the theory behind this device is that members of the protected class "are more likely to be victims of age discrimination than its perpetrators." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) (reversing an age discrimination jury verdict for the plaintiff).

This inference is contrary to a long established precept of this Court, i.e., that persons of the same class or group can and, indeed, do discriminate against each other. For example, more than thirty years ago, in *Castaneda v. Partida*, 430 U.S. 482 (1977), the Court upheld a challenge by a Mexican-American prisoner to the "key man" grand jury selection process, despite Texas' assertions that the Mexican-American prisoner's Fourteenth Amendment rights could not have been violated because three of the five jury commissioners were Mexican-American and the pool from which the jurors was chosen was largely Mexican-American. The Court concluded that "because of the many facets of human motivation, it would be unwise to presume as a matter of law that human

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[14/] *See, e.g., Richter v. Hook-Superx, Inc.*, 142 F.3d 1024, 1032 (7th Cir. 1998) (There is no inference of age discrimination when "decision-makers were themselves 46, 53, and 60 years old at the time of the decision. While not dispositive, this Court has found it significant that individuals alleged to have discriminated on the basis of age were themselves members of the protected class."); *Molenda v. Hoechst Celanese Corp.*, 60 F. Supp 2d 1294, 1304 (S.D. Fla. 1999) (The fact that both decisionmakers were in the protected age group, ages 55 and 56, and were substantially older than the 41 year old plaintiff contributed to the court's conclusion that no unlawful discrimination occurred).

beings of one definable group will not discriminate against other members of that group." *Id.* at 499.

In his concurrence in *Castaneda*, Justice Marshall described how a person of one protected class could readily discriminate against another member of that same class:

> In the first place, Mr Justice Powell's assumptions about human nature [that persons of the same race would not discriminate against each other], plausible as they may sound, fly in the face of a great deal of social science theory and research. Social scientists agree that members of [protected classes] frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of [protected classes] who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.

Id. at 503 (footnotes omitted).

Recently, the Court unequivocally reacknowledged that intra-group discrimination was possible and, indeed, actionable under Title VII in the case of a male oil rig roustabout who was sexually harassed by his male supervisors and other males:

> If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination"because of ... sex" merely because the plaintiff and the defendant(or the person charged with acting on behalf of the defendant) are of the same sex.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, __, 118 S.Ct. 998, 1001-02 (1998).

The reason for such a conclusion is straightforward: It strains credulity to assume that simply because a person is a member of the protected group, he or she is incapable of or unwilling to unlawfully discriminate on the basis of the protected characteristic, *e.g.*, sex, race, age, etc., against another person in the protected group. "The proposition that people in a protected category cannot discriminate against their fellow class members is patently untenable." *Danzer v. Norden Systems, Inc.*, 151 F. 3d 50, 55 (2d Cir. 1998).

The unstated counterinference drawn by the court below, that there could not have been age discrimination against the 57-year-old Reeves simply because two of the four decisionmakers were over age 50, is an impermissible basis for overturning the jury's verdict.

B. The Court of Appeals Erred By Inferring That Because Sanderson Did Not Discriminate Against Other Older Employees It Did Not Discriminate Against Reeves.

The second unexplained factor relied on by the court below to overturn the jury verdict for Reeves, was that "there is evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's." *Reeves*, at 613. This reasoning is based on the same fallacious bottom line analysis that the Court unequivocally rejected in *Connecticut v. Teal*, 457 U.S. 440, 455 (1982): "Congress never intended to give an employer license to discriminate against some employees ... merely because he treats favorably

other members of the employees' group."[15] In this disparate treatment case, the nondiscriminatory treatment of other persons in the protected age group is simply not relevant to the issue of whether Reeves was discriminated against. Based on the evidence, the jury concluded that Sanderson discriminated against Reeves because of his age and that the discrimination was willful. It is not Reeves's evidence that is insufficient here. Rather, what is insufficient are the reasons the court below provided for overturning the jury's verdict.

IV SUFFICIENCY OF THE EVIDENCE IS NO SUBSTITUTE FOR A PROPER *McDONNELL DOUGLAS* ANALYSIS.

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), the Court assumed without deciding that the basic evidentiary framework set forth in *McDonnell Douglas* is fully applicable to claims under the ADEA.[16] AARP urges the Court to reaffirm that decision by

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[15] *See also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978)("[A] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination . . . . It is clear beyond cavil that the obligation imposed by Title VII is to provide equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's races are already proportionately represented in the work force.") (citations omitted).

[16] Every court of appeals has also embraced the *McDonnell Douglas/Burdine* framework as being applicable to ADEA-based claims. *See, e.g., Sanchez v. Puerto Rico Oil, Co.*, 37 F.3d 712, 719 (1st Cir. 1994); *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); *Showalter v. University of Pittsburgh Med. Ctr.*, 190 F.3d 231, 234 (3d Cir. 1999); *Dockins v. Benchmark Communications*, 176 F.3d 745 (4th Cir. 1999); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732 (5th Cir. 1999); *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121 (6th Cir. 1998); *Wichmann v. Board of Trustees of Southern Illinois Univ.*, 180 F.3d 791, 803 (7th Cir. 1999); *Vaughn v. Roadway Express, Inc.*, 164 F.3d 1087, 1090 (8th Cir. 1998); *Ritter v. Hughes*

holding that Reeves presented sufficient evidence to support the verdict in his favor under the *McDonnell Douglas* indirect method of proof as construed by *Hicks*.

Although many courts have departed from the Court's original objective in formulating the *McDonnell Douglas* proof paradigm,[17/] when it is properly interpreted and applied, it is critical to the ability of age discrimination plaintiffs to prove their claims. Indeed, the Court has acknowledged, "[t]he objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995).

It would be not only illogical, but impractical indeed, to establish a unique evidentiary framework for the ADEA separate from other employment discrimination statutes because there is "no inherent reason why *McDonnell Douglas* is any less a 'sensible, orderly way to evaluate the evidence' in an age case than in any other." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979), quoting *Furnco*, 438 U.S. at 577. Additionally, the Court has acknowledged that the ADEA is an integral part of this nation's collective law prohibiting employment discrimination:

> The ADEA, enacted in 1967, as part of an ongoing congressional effort to eradicate

Aircraft Co., 58 F.3d 454 (9th Cir. 1995); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159 (10th Cir.), *cert. denied*, 119 S. Ct. 617 (1998); *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997); *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998).

17/ "[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J. concurring); *see also Thurston*, 469 U.S. at 121 ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.").

> discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988 ed. and Supp. V) (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 1201 *et seq.* (1988 ed., Supp. V) (disability); the National Labor Relations Act, 29 U.S.C. § 158(a) (union activities); the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex).

McKennon, 513 U.S. at 357.[18/] "The mere fact that Congress chose to pass a separate statute rather than to amend Title VII does not imply that age discrimination was intended to be subject to different standards and methods of proof than race or sex discrimination." *Loeb*, 600 F.2d at 1015. Because age discrimination victims, like all other victims of employment discrimination, are unlikely to have direct evidence, they must continue to be afforded the means of ensuring that they will have their day in court.

18/ The Court has made the identical observation on several other occasions. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) ("[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace . . . ."); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("There are very important similarities between [Title VII and the ADEA], . . . both in their aims – the elimination of discrimination from the workplace – and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII."); *Thurston*, 469 U.S. at 121 ("The substantive, antidiscrimination provisions of the ADEA were modeled upon the prohibitions of Title VII.").

CONCLUSION

The court below misconstrued *Hicks* to allow it to substitute its independent evaluation of the evidence for that of the jury based on pro-employer counterinferences of questionable validity, even though all three *Hicks* requirements, a *prima facie* case, proof of pretext, and a finding of discrimination were satisfied. By imposing what is tantamount to a requirement that plaintiffs must produce direct evidence of discrimination in order to prevail, the decision of the court below so distorts the *McDonnell Douglas* proof paradigm, which was designed to insure an impartial hearing for employment discrimination plaintiffs, that it is all but unrecognizable. The Court must not countenance the evisceration of the ADEA as well as Title VII and other civil rights statutes by ratifying a proof requirement that almost no plaintiff can meet and which the Court has heretofore emphatically rejected.

To the contrary, in order to assure the fairness to employment discrimination plaintiffs the Court sought to achieve in *McDonnell Douglas*, the Court should reverse the judgment of the court below and hold that Reeves's evidence was sufficient to sustain the jury's verdict of willful discrimination in his favor.

Respectfully submitted,

Thomas W. Osborne*
Laurie A. McCann
Sally Dunaway
AARP Foundation Litigation

Melvin Radowitz
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP
Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

RICHARD H. MIDDLETON
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President, The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae
**Counsel of Record*

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

injured plaintiffs in civil actions. Central to ATLA's mission is the preservation of the right to trial by jury, guaranteed by the Seventh Amendment in the Constitution of the United States as well as the constitutions of nearly every State.

This right was placed in the Bill of Rights primarily as a guard against encroachment by judges on the historic role of the jury. ATLA is concerned that aggressive appellate review of jury verdicts based on sufficiency of the evidence threatens to undermine this important and fundamental right.

In ATLA's view, judicial authority to overturn a jury's verdict and enter judgment for the opposing party carries grave potential danger to the right to trial by jury. For that reason, the exercise of that authority should be subjected to the closest scrutiny.

SUMMARY OF THE ARGUMENT

1. The right to trial by jury in civil cases is in danger of being eroded by aggressive review of jury verdicts on the part of federal appellate courts.

The jury trial is not merely a procedural device. It is a fundamental right and an essential element of self-government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from reexamination of facts found by a jury except under the rules of common law.

The common law provided no means of reexamining factual issues decided by juries, except as issues of law where no evidence supported the verdict. At the trial level, judges have relaxed that standard, employing the "substantial evidence" or "reasonable jury" test in passing upon motions for judgment as a matter of law.

Entry of judgment as a matter of law by appellate courts to set overturn jury verdicts was approved by this

court relatively recently. However, appellate courts have adopted for themselves the standard of sufficiency of the evidence employed by many trial courts, reviewing the sufficiency of evidence de novo, based on review of all the evidence of both parties and applying the "reasonable jury" test. The result has been a dramatic increase in the number of jury verdicts overturned by courts of appeals with entry of judgment as a matter of law, rather than new trial. Such aggressive review of jury verdicts for sufficiency of evidence threatens the essential function of the jury protected by the Seventh Amendment. It is also inconsistent with Federal Rule of Civil Procedure 50, which provides for an informed discretionary decision whether to enter judgment as a matter of law or order a new trial where the evidence has been found insufficient to support the verdict.

2. This Court should hold that courts of appeals may enter judgment as a matter of law against the verdict winner only in cases in which no evidence supports the jury's verdict. Where there exists some evidence, albeit not legally sufficient, the appellate court may enter a new trial or remand to the trial judge to make the discretionary determination of whether a new trial or judgment as a matter of law is warranted.

Such a ruling carries out the purpose of Fed. R. Civ. Pro. 50 and this Court's decisions which place great reliance on the unique position occupied by the trial judge to exercize informed discretion in deciding whether to enter judgment or order new trial. It also conforms with this Court's decisions under the Seventh Amendment which have applied the no-evidence rule to appellate courts evaluating the sufficiency of the evidence.

Limiting the power of appellate courts to enter judgment as a matter of law to "no-evidence" cases also serves strong policy interests. It results in greater fairness to the verdict winner who was entitled to rely on the trial judge's determination that the evidence was sufficient for the

jury. It results in greater accuracy of factual determinations in civil cases, particularly those where the jury challenged jury finding relates to matters of intent or motive, where juries are likely to be more reliable factfinders than appellate judges. Finally, the rule represents the best use of judicial resources, placing the decision between judgment or a new trial in the hands of the trial judge, is best equipped to make that decision.

ARGUMENT

I. ENTRY OF JUDGMENT AS A MATTER OF LAW BY AN APPELLATE COURT, CONTRARY TO A JURY'S VERDICT AND BASED ON DE NOVO REVIEW OF ALL THE EVIDENCE, UNDERMINES THE SEVENTH AMENDMENT.

A. The Re-examination Clause of the Seventh Amendment Protects the Fundamental Right And Vital Democratic Institution of Trial By Jury From Judicial Usurpation.

The American civil jury is in danger.

The founding generation, who fought to secure for themselves the right to trial by jury in civil cases, were so fearful that this right would be undone by federal appellate reexamination of jury findings, that they included a specific prohibition of the practice in the Seventh Amendment. *Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415, 449 (1996) (Scalia, J., dissenting).

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend. vii.

Justice Story pronounced the re-examination provision as the "more important" clause. *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 447 (1830). As he earlier explained, "one of the most powerful objections urged against [the Constitution]" was that it "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury." *United States v. Wonson,* 28 F.Cas. 745, 750 (No. 16,750) (C.C.Mass. 1812). The Re-examination Clause was intended to put to rest "apprehensions" of "new trials by the appellate courts." *See Gasperini, supra* at 452 (Scalia, J. dissenting).

Today, this Court is presented with an example of precisely the judicial usurpation of the jury right that the founders feared. Mr. Reeves sued Sanderson, his former employer, alleging that he was fired because of his age. The jury received both sides' evidence and found the employer had in fact discriminated against Reeves. The district court denied Sanderson's post-trial motions.

The court of appeals undertook a de novo review of both sides' record evidence and found differently. "[W]e conclude that Reeves did not prove a violation of the Age Discrimination in Employment Act ("ADEA") by a preponderance of the evidence. Hence we reverse the district court's order and render judgment in favor of Sanderson." Pet. at 1a-2a.

This pronouncement reads jarringly like the conclusion of a bench trial, rather than appellate review with due regard for the Seventh Amendment. Disturbingly, this decision is but an example of a broader trend among federal courts of appeals toward increased willingness to set aside the verdicts of juries in civil cases and enter judgment for the verdict loser, rather than order a new trial.

That the facts in this case were decided by an appellate panel rather than the jury might be a matter of indifference if trial by jury were simply an available

procedure for the resolution of private disputes. On the contrary, this Court has repeatedly emphasized:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942) ("The right of jury trial in civil cases at common law is a . . . right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts.").

The American colonists' reverence for the institution of the jury was rooted in the jury's role in England as a shield against governmental oppression, a matter of increasing interest to the colonials. They admired the heroism of Edward Bushel and the other jurors who refused to convict Quaker William Penn in 1670, though they were fined and jailed by the trial judge. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988). The acquittal in 1688 of seven Anglican bishops of seditious libel for signing a letter in opposing the king elevated the jury in public esteem "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.* These examples undoubtedly influenced the New York jury that refused to convict journalist John Peter Zenger of seditious libel in

1734. Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579, 593 (1993).

The civil jury as well was valued as a check on oppressive government. Americans cheered the jury verdicts in the lawsuits of John Wilkes and his printer against officials who executed an illegal warrant to arrest Wilkes and seize his allegedly seditious publication. Landsman, *supra*, at 591. They applauded Lord Camden's decisions recognizing the jury's authority to award exemplary damages. *Wilkes v. Wood,* Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). *See* Linda Schlueter & Kenneth Redden, PUNITIVE DAMAGES 6-9 (2d ed. 1989). Indeed, Wilkes' case was cited in debates in support of the need for a constitutional guarantee of the jury right in civil cases. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

But the colonists found themselves frequently deprived of that right as England moved the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957).

They complained bitterly of these infringements through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. ("For depriving us in many cases, of the benefits of Trial by Jury"). "The struggle over jury rights was, in reality, an important aspect of the fight for American independence." Landsman, *supra*, at 596.

For in transplanting the English jury system to the New World, the colonists had transformed it into an important means of governing themselves. Historical records of the period refer to the civil jury, and most especially the right to serve on civil juries, as a political right of immense importance to independence and self-government. *See, e.g.*, Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991); William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

By the time the United States declared independence, the civil jury was also valued as a shield against private oppression. In the developing economy, farmers, as well as shopkeepers and traders, depended upon credit. In the mid-1700s, jury caseloads across America soared as farmers and other debtors relied on local juries to ameliorate the harshness of the commercial law in the hands of judges who tended to be drawn from and identified with the wealthier class. Landsman at 594; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671-77 (1973).

So when the delegates emerged from their secret convention in Philadelphia in 1787 with a draft constitution that omitted a guarantee of the right to trial by jury in civil trials, many Americans were outraged. Moreover, the grant of appellate jurisdiction to the Supreme Court in Art. III §2, cl. 3 over issues of fact and law, suggested to many that the constitution represented "virtual abolition of the civil jury." Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295 (1966); *see, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d

ed. 1836)(remarks of James Monroe at the Virginia ratification convention).

Alexander Hamilton reported that "the want of a constitutional provision for the trial by jury in civil cases" was the most successful argument by opponents. THE FEDERALIST No. 83, at 495 (C. Rossiter ed. 1961). The Antifederalists harbored grave fears that the new national government would fall under the control of a small elite of moneyed interests and that the unelected, life-tenured federal judiciary would be selected from and would serve that elite. 3 THE COMPLETE ANTI-FEDERALIST 49 ("An Old Whig"). They frequently cited Blackstone's warning that judges tend to favor their own class; the jury was a shield against oppression by the wealthy as well as by government. Scheiner, *supra*, at 152-54. As Justice Story subsequently recounted, this objection "was pressed with an urgency and zeal, which were well nigh preventing its ratification." Joseph. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (1833)(R. Rotunda & J. Nowak eds. 1987).

Ultimately, the antifederalist arguments prevailed. "As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830).

The Seventh Amendment stands as a limitation specifically directed at the power of the federal judiciary. *See Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White J. dissenting); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957). As Judge Patrick Higginbotham points out, "American federal courts . . . have a peculiar need for the democratizing influence of the jury" because an independent judiciary also

carries "its attendant risk of autocratic behavior." Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power,* 56 Texas L. Rev. 47, 52 (1977).

Historically, this Court has rigorously enforced this limitation.

> "During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment right to trial by jury in civil cases. Prior to 1968 the Court regularly granted review in several cases each year to consider the sufficiency of the evidence to support a disputed jury verdict, and in the overwhelming majority of the more recent cases did so to reinstate a jury verdict that had been overturned by an appellate court."

Eric Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237.

B. Aggressive Appellate Review Of Jury Verdicts Threatens The Seventh Amendment Role Of The Jury.

As the constitutional text suggests, "to ascertain the scope and meaning of the Seventh Amendment resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick v. Schiedt,* 293 U.S. 474, 476 (1935). The court of appeals decision in this case is a far cry from what the drafters had in mind as exceedingly limited review of jury findings "according to the rules of common law."

"The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings." *Parsons, supra,* at 448. A venire facias

de novo was an order directing a new trial. Black's Law Dictionary 1727 (4th ed. 1951). At best, then, the losing party could obtain only a new trial. At common law, the only means of avoiding the verdict of a jury was the demurrer, in which the movant was obliged to admit all the facts as well as the inferences that might be drawn therefrom, presenting the court with only issues of law. The only means of review of judgments entered upon a jury's verdict was by writ of error on issues of law alone. *See Galloway v. United States*, 319 U.S. 372, 407 (1943)(Black, J., dissenting). Hence, appellate review was limited strictly to issues of law. *See Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415 ,449, 452-53 (1996) (Scalia, J., dissenting). Judgment as a matter of law, as provided for in Fed. R. Civ. Pro. 50, was unknown at common law in trial courts, much less in appellate tribunals. *Gasperini,* 518 U.S. at 436 n.20.

This Court has long held the view that the Seventh Amendment "does not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791,'" *Colgrove v. Battin,* 413 U.S. 149, 156-57 (1973), quoting *Galloway v. United States,* 319 U.S. 372, 390 (1943). Hence there exists no general bar to the invention of new procedural devices in jury trials, so long as the essential role of the jury as finder of fact is preserved.

At the trial level, 19th Century judges gained some measure of control over juries by use of the directed verdict and, later judgment n.o.v. The Court approved the directed verdict in *Parks v. Ross*, 52 U.S. (11 How.) 362 (1850) as equivalent to the demurrer. It did not violate the Seventh Amendment when there was "no evidence whatever" to sustain a verdict favoring the nonmovant. *Id.* at 372-73. Where there is not sufficient evidence to raise a question of fact, there is nothing for the jury to decide and submission of

the case to a jury would be an empty gesture.[2] An issue of fact on which there is no evidence becomes an issue of law. The Court insisted, however, that a directed verdict was proper if there was "no evidence" on the factual issue; but not if there were "some." *Hickman v. Jones*, 76 U.S. 197, 201 (1869).

The Court appeared to relax that standard somewhat in *Schuylkill and Dauphin Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1871), allowing a directed verdict when the evidence offered by the nonmovant was too insubstantial to support a reasonable jury's verdict in its favor, reasoning that the Seventh Amendment entitles a party to only a reasonable jury's consideration. *Id.* at 447-48. Lower courts have increasingly loosened the standard to one of "substantial" evidence or evidence sufficient for a "reasonable juror." Schnapper at 277; Charles A. Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2529 (1995) [hereinafter "Wright and Miller"].

This Court has not approved a more lenient standard for appellate courts. At common law, review of judgments was had only on writ of error, limited to questions of law. *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830) (Story, J.)(district court did not err in refusing to allow transcription of witness testimony for appeal because "[t]he whole object" of the transcription was "to present the evidence here in order to establish the error of the verdict in matters of fact," which is not permissible on writ of error).

> No one supposed or claimed for one moment, that the English common-law jury could exist under a system of law that allowed an appeal from a verdict of a jury to a bench of judges with affirmative judicial power to find

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[2] Previously, even where there was no evidence tending to prove a particular fact, courts were obliged to allow "the jury the right of weighing the evidence and determining what effect it shall have." *Greenleaf v. Birth*, 9 Pet. 292, 299 (1835)

> the same fact in issue different from the finding of the jury, albeit on the same evidence.

Henry Schofield, *New Trials and the Seventh Amendment -- Slocum v. New York Life Insurance Co.*, 8 Ill. L. Rev. 287, 303 (1913).

Long after trial judges were permitted to enter directed verdicts, this Court held that an appellate court could not itself enter judgment n.o.v. upon finding that a directed verdict was erroneously denied below. The Seventh Amendment entitled the appellee a retrial by a new jury. *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1914).[3]

After the adoption of the Federal Rules of Civil Procedure in 1938, courts of appeals construed Rule 50 as permitting the entry of judgment n.o.v. based on the insufficiency of the evidence rather than a new trial.

Justice Black cautioned in *Galloway v. United States*:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issues in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

319 U.S. 372, 407 (1943)(Black, J., dissenting).

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[3] The court in *Redman* "undermined Slocum by adopting from English practice the 'reservation of a point' originally performed by a nisi prius judge who wanted a decision later en banc at Westminster, to justify the appellate court's grant of judgment n.o.v. Rule 50(b), passed in 1938, converted the reservation into a fiction by 'deeming' it to have been made whenever a directed verdict motion was denied." *Henderson, supra* at 337 n.211

Indeed, this Court exercised great vigilance. From 1938 to 1968, the Court granted certiorari in 25 cases in which federal courts of appeals had overturned jury verdicts for insufficient evidence. The Court ordered reinstatement of the verdicts in 24 of the cases. Schnapper, *supra*, at 241.

It was not until *Neely v. Martin K. Eby Const. Co.*, 386 U.S 317, 324 (1967) that this Court expressly approved the entry of judgment n.o.v. "in appropriate cases." After 1968, however, the Court granted review in relatively few such cases. During that period, in the absence of strong guidance from this Court, there occurred a noticeable increase in the number of lower federal court decisions overturning jury verdicts on the basis of sufficiency of evidence, few of which even referred to the Seventh Amendment. Schnapper, *supra* at 246-253.

A major factor in this trend toward increasingly aggressive review of jury verdicts by appellate courts was the appellate courts' adoption of the more relaxed standard which had become increasingly favored by the district courts, rejecting the "no-evidence" rule in favor of "substantial evidence" or "reasonable jury" formulations. *See* Wright and Miller, supra, at § 2522; Steven Alan Childress *A 1995 Primer On Standards Of Review In Federal Civil Appeals*, 161 F.R.D. 123, 133 (1995).

In applying this standard, courts permitted themselves to consider the evidence introduced by both sides. *Id.* The older rule originating from the demurrer, that a verdict cannot be overturned by contrary evidence from the losing party, became "virtually a dead letter" in the lower federal courts. Schnapper, *supra,* at 294

The magnitude of the trend is apparent from a survey of federal court of appeals opinions issued during 1984-85. In 175 cases in which verdict loser asked for appellate judgment n.o.v., the appellate court granted judgment in 67 cases. *Id.* at 248. The results suggest that:

> [A] large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box.

Id., at 354.

The result has been "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway,* 319 U.S. at 397. Recently, however, the Court has turned its attention once again to the protection of the Seventh Amendment right to trial by jury and to the limits imposed on federal courts of appeals by the Re-examination Clause. *Hetzel v. Prince William County*, 523 U.S. 208 (1998)

II. APPELLATE COURTS MAY SET ASIDE A JURY VERDICT AND ENTER JUDGMENT AS A MATTER OF LAW ONLY WHERE THERE IS NO EVIDENCE SUPPORTING THE VERDICT.

A. The Lower Court's Entry of Judgment As A Matter of Law Based on De Novo Review of All the Evidence Is Inconsistent With Fed. R. Civ. Pro. 50.

Rule 50 does not expressly provide for entry of judgment as a matter of law by an appellate court.[4] As a

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[4] **Denial of Motion for Judgment as a Matter of Law.**
If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to

general proposition, this Court has stated, "there is nothing in Rule 50(d) indicating that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Neely v. Martin K. Eby Const. Co.*, 386 U.S 317, 324 (1967). Amicus suggests that cases in which the nonmovant has introduced *some* evidence on a factual issue are not "appropriate" cases -- even where the appellate court is convinced that a reasonable jury would deem the evidence unpersuasive or overmatched by opposing evidence. In such cases, the court should be limited to the options provided by Rule 50(d) -- ordering a new trial or remanding to the trial court for determination of whether a new trial is warranted.

Even a cursory review of the lower court's short unpublished opinion demonstrates the appropriateness of this construction. Reeves, a 57-year-old Sanderson employee, was fired and replaced with a younger man. Chesnut, the Director of Manufacturing who recommended the firing, had made derogatory remarks about Reeves' age. Sanderson did not dispute that Reeves had made out a prima facie case of age discrimination, but claimed that he was fired because of his "shoddy record keeping." Pet. at 7a. The jury, however, found that Sanderson had discriminated against Reeves because of his age. The trial judge denied defense motions for judgment as a matter of law or a new trial.

The court of appeals reviewed the record de novo to find "that Reeves did not introduce sufficient evidence of age discrimination." Pet. at 10a. By undertaking an assessment of

---

a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Fed. R. Civ. Pro. 50(d).

The 1963 Advisory Committee's Note adds:

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

all the evidence introduced by both sides, the court made it necessary to assign some weight and credibility to various items of proof -- evaluations which might and likely did differ from those made by the jury. For example, the court gave little weight to Chesnut's disparaging remarks, because he was only one of three persons who recommended the firing to the company president. The jury might well accord them greater weight inasmuch as Chesnut was married to the company president. The court set great store in the fact that the president was only five years younger than Reeves and other managerial employees were over the age of 50. Pet. at 9a & 10a. The jury apparently gave little weight to the notion that those who ran the company would not treat workers in a fashion they would not want for themselves.

The court brushed aside the "inconsistency" between the reason given to Reeves when he was fired and that advanced at trial as indicative of good trial preparation, rather than mendacity. Pet. at 8a. The jury may have found Sanderson's explanation rather less credible for that. The court was not concerned that Sanderson may not have been "forthright in its explanation for firing Reeves." The jury might have deemed this a matter of greater import because Sanderson was now asking the jurors to believe its explanation.

It requires a fair amount of confidence to declare that no reasonable jury could find that Sanderson discriminated when, in fact, the jury found precisely that. The court's plenary review of the record does not allow for the possibility that such confidence might be unwarranted. Ascertainment of intent or motive generally requires some drawing of inferences and assessment of credibility. It is a fair estimate that many jurors have first-hand experience in the workplace and are more adept at reading the clues surrounding a company's employment decisions than life-tenured federal judges. To examine both sides' evidence, including that which the jury ignored or disbelieved, disregards the

knowledgeable jury as unreasonable. The trial judge who occupied a front-row seat as the case unfolded before the jury would likely possess the most reliable insight into whether the jury was unreasonable. By engaging in de novo review, applying the same standard as applied by the trial judge, the court of appeals renders the judge's evaluation of the sufficiency of the evidence of no consequence whatever.

In *Neely*, the Court did not issue blanket approval for an appellate court to enter judgment as a matter of law whenever it determines that such a judgment should have been granted below. Indeed, Justice White's opinion is carefully nuanced:

> There are, on the one hand, situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation. . . . In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant.
>
> On the other hand, where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated.

386 U.S. at 326-27.

> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues -- because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

Id at 325.

Hence, the Court concluded, "the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329.

Amicus suggests that this exception encompasses cases, such as Reeves', where the nonmovant has introduced some evidence, albeit not a legally sufficient quantum in the view of the appellate court. Even where the evidence is insufficient to support the verdict returned by a jury, Rule 50 requires an exercise of informed discretion to determine whether a new trial is warranted rather than judgment as a matter of law. In cases where there is no evidence to support the verdict, the court of appeals is capable of ruling, as a matter of law, that denial of an appropriate Rule 50(b) motion constituted clear error on the part of the district judge. *Compare* Fed. R. Civ. Pro. 52. *Neely* indicates that the court of appeals may enter judgment under that circumstance, though Rule 50(d) does not oblige it to do so.

Where the verdict winner has adduced at least some evidence, the appellate court is not equipped to exercise that informed discretion called for by the Rule. As this Court had earlier explained:

> Rule 50(b) . . . does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."

Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212, 215-16 (1947); *see also Globe Liquor Co., Inc. v. San Roman*, 332 U.S. 571 (1948).

In the instant case, for example, the court of appeals was obliged to speculate whether the "inconsistency" between the reasons first given to Reeves for his firing and those ultimately presented at trial "smacks more of competent trial preparation than telling a lie." Pet. at 8a. Though the paper record might be opaque, the trial judge may be expected to have greater insight into the significance of the change.

Amicus suggests that such cases in which some evidence is nonetheless held to be legally insufficient present the circumstance addressed by the Advisory Committee's Note to Rule 50(d), which states that "remanding the case for a determination by the trial court as to whether a new trial should be granted. . . . is advisable where the grounds urged are suitable for the exercise of trial court discretion."

Less than two months after its decision in *Neely*, this Court issued a per curiam decision applying *Neely* which could well stand as an appropriate resolution of the instant case:

> Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers.

Iacurci v. Lummus Co., 387 U.S. 86, 88 (1967)

B. Appellate Court Entry of Judgment As A Matter of Law Based on De Novo Review of All the Evidence Violates the Seventh Amendment

Even allowing that Rule 50 permits an appellate court to set aside a jury verdict and enter judgment as a matter of law, a procedure that was not available at common law in 1791, the exercise of such power must not be permitted to violate the essential function of the Seventh Amendment, which is the preservation of "the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935).

For these reasons, this Court has been highly protective of the jury's role:

> Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). *See also McKnight v. Johnson Controls, Inc.*, 36 F.3d 1196 (8th Cir. 1994) (on motion under Rule 50 for judgment as a matter of law, courts "must not engage in a weighing or evaluation of the evidence or consider questions of credibility" in determining that no reasonable inference can sustain the verdict).

With respect to the standard to be applied by trial judges in passing on the legal sufficiency of the evidence, Justice Black in his *Galloway* dissent complained that this Court had abandoned the original "no-evidence" standard in favor of one that required "substantial evidence" from the nonmovant, occasioning a "transition from jury supremacy to jury subordination." 319 U.S. at 403-04 (Black, J. dissenting). That more aggressive standard invites courts to consider all the evidence introduced by both sides, a practice that "comes dangerously close to a judicial weighing of the evidence." Wright and Miller at § 2529.

As to the standard to be applied by a court of appeals reviewing the denial of judgment n.o.v., however, the Court has held appellate courts to the no-evidence standard, based solely on the non-movant's evidence, which was the original basis for approving the directed verdict as a replacement for demurrer.

In *Lavender v. Kurn,* a state supreme court overturned a jury verdict for plaintiff in a Federal Employees Liability Act suit, after examining the evidence of both parties and concluding there was "no substantial evidence of negligence." This Court reversed:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

327 U.S. 645, 653 (1946) (emphasis added).

This Court made clear that its decision was based on the right to trial by jury, stating, "it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." Id. at 652-53.

The Court subsequently reiterated its position that it "is

the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949).

Amicus submits that the Seventh Amendment imposes a stricter standard on appellate courts than may be tolerated at the trial court level. As the Court stated in *Gasperini*, "practical reasons combine with Seventh Amendment constraints" to warrant different standards regarding review of jury verdicts for trial judges, who "have the 'unique opportunity to consider the evidence in the living courtroom context, . . . while appellate judges see only the 'cold paper record.'" Gasperini at 438. (citation omitted)

The Fifth Circuit expressly rejected the no-evidence rule in *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969), dismissing this Court's decisions as applicable only to FELA cases. This Court's opinion in *Lavender* does not limit its discussion of the right to trial by jury to cases brought under the FELA. The Reexamination Clause applies to all cases in which a jury has made a finding of fact, regardless of whether the right to trial by jury arises from federal statute or the constitutional command contained in the amendment's first clause. The FELA expresses a strong policy that favors jury determinations. it cannot be argued that the federal antidiscrimination statutes, such as the ADEA, or the Seventh Amendment itself which explicitly preserves the jury right, express a lesser policy.

This Court recently underscored the restrictions imposed by the Seventh Amendment on appellate courts in *Hetzel v. Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998), a discrimination case under Title VII and §1983. The Court held that, even where the court determined that the amount of damages was grossly excessive, the Seventh Amendment prohibits the court from substituting its

own assessment of the appropriate damages, and requires that the party be given the option of a new trial.

C. Strong Policy Reasons Support Limiting Appellate Authority to Enter Judgment as a Matter of Law To Cases In Which There Is No Evidence To Support The Jury's Verdict.

Quite apart from the constitutional command of the Seventh Amendment, strong policy reasons support a ruling by this Court that appellate courts may enter judgment as a matter of law only where there is no evidence to support the verdict.

1. Fairness

This Court in *Neely* emphasized that concerns for fairness toward the verdict winner generally require the court of appeals to order a new trial or remand to the district court to determine whether a new trial is warranted, rather than enter judgment. 386 U.S. at 325. In this case, for example, plaintiff may have given little attention to the fact that the company president was only five years younger than Reeves or that a certain percentage of managerial employees were in their fifties or sixties. For the appellate court to focus on these facts may unfairly deprive plaintiff of the opportunity to introduce additional or contradictory evidence that he would have pursued if he had known its importance. Plaintiff justifiably relied on the district court's determination, both before and after the verdict, that the evidence he had adduced was sufficient to support a verdict. At minimum, fairness requires the court of appeals to remand to the trial court for a determination whether plaintiff should be allowed to refashion his case before a new jury.

Such a situation is analogous to the position of a verdict winner whose evidence is subsequently held erroneously admitted. As the Eighth Circuit states, fairness is that circumstance requires that the verdict winner be afforded

a new trial, rather than be subject of judgment as a matter of law:

> The subsequent ruling [to exclude admitted evidence], after the verdict, . . . placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such [evidence] was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

Midcontinent Broadcasting Co. v. North Central Airlines, 471 F.2d 357, 359 (8th Cir. 1973).

2. Accuracy

If "history and precedent provide no clear answers," this Court has said, "functional considerations also play their part in the choice between judge and jury." *Markman v. Westview Instruments, Inc.*, .517 U.S. 370 (1996). In that case, this Court determined that defining terms of art in a patent was peculiarly suited to the judge, who "is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be." In such cases "a jury's capabilities to evaluate demeanor, to sense the 'mainsprings of human conduct,' or to reflect community standards are much less significant. *Id.* at 389-90 (citations omitted)

Many of the cases in which appellate courts enter judgment as a matter of law, like this case, involve issues of intent or motive, particularly in the context of employment discrimination. Schnapper, *supra* at 249-50 and so involve precisely those capabilities that make the jury "more likely to be right."

3. The Best Use of Judicial Resources

The plain fact is that even the most conscientious appellate judges can devote only a limited amount of time to

scrutinizing voluminous paper records associated with appeals from denials of post verdict motions. Yet the appellate tribunal cannot achieve the familiarity and detailed knowledge of a case possessed by the trial judge. A rule which requires a court of appeals to remand cases in which there is some, though not legally sufficient evidence to support the verdict, places the discretionary decision whether to enter judgment as a matter of law or proceed with a new trial in the hands of the judge who is best equipped to make that decision.

Even if it is not altogether certain that the practice of de novo review of the entire record is a clear violation of the Seventh Amendment, the importance of the jury right should lead this Court to conclude that it amounts to an abuse of the appellate court's discretion under Rule 50. Justice Blackmun advised, "uncertainty in the historical record should lead us . . . to give the constitutional right to a jury trial the benefit of the doubt." *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 92 (1989) (Blackmun, J, dissenting). "If, in the rare case, a tie-breaker is needed," Justice Brennan once counseled, "let us break the tie in favor of jury trial." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580 (1990)(Brennan, J., concurring).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae

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IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

DANIEL F. KOLB
CHARLES T. LESTER, JR.
Co-Chairs
NORMAN REDLICH,
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR*
TERESA A. FERRANTE

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW
Suite 400
Washington, DC 20005
Telephone: 202-662-8600

January 7, 2000

**Counsel of Record*
(Additional Counsel listed on inside cover)

43pp

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
Telephone: 212-219-1900

DENNIS C. HAYES,
General Counsel
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE
4805 Mt. Hope Drive
Fifth Floor
Baltimore, Maryland 21215
Telephone: 410-486-9191

ANTONIA HERNANDEZ
President
THERESA FAY-BUSTILLOS
MALDEF
634 South Spring Street
Eleventh Floor
Los Angeles, CA 90014
Telephone: 213-629-2516

JUDITH L. LICHTMAN
DONNA R. LENHOFF
NATIONAL PARTNERSHIP FOR
WOMEN & FAMILIES
1875 Connecticut Ave. NW
Suite 710
Washington, DC 20009
Telephone: 202-986-2600

MARCIA D. GREENBERGER
JUDITH C. APPELBAUM
NATIONAL WOMEN'S
LAW CENTER
11 Dupont Circle N.W. Suite 800
Washington, D.C. 20036
Telephone: 202-588-5180

MARTHA F. DAVIS
NOW LEGAL DEFENSE AND
EDUCATION FUND
395 Hudson Street, 5th Floor
New York, New York 10014
Telephone: 212-925-6635

SARA L. MANDELBAUM
STEVEN R. SHAPIRO
AMERICAN CIVIL
LIBERTIES UNION
125 Broad Street
New York, N.Y. 10004
Telephone: 212-549-2611

Attorneys for Amici Curiae

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STATEMENT OF INTEREST[1]

The *amici* have a strong interest in the standards by which unlawful discrimination may be inferred from circumstantial evidence, because these standards will determine whether numerous victims with meritorious claims will be able to prove their claims and obtain relief. The *amici* oppose standards of proof so high that many violations of the civil rights laws will go unrecognized and unremedied. One or more of the *amici* have, singly or jointly, filed briefs in the majority of this Court's civil rights cases over the last twenty years.

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and

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[1] Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici* state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the *amici* and their counsel, made any monetary contribution to its preparation or submission.

its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging employment discrimination.

The NAACP Legal Defense & Educational Fund, Inc. ("the Fund"), is a nonprofit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. The Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963).

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland where it maintains its national headquarters. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access and public resource

equity. The question presented by this case is of great interest to MALDEF because it implicates the scope of the remedies available to victims of discrimination, as well as how courts should view the act of intentional discrimination itself.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. NWLC has worked since 1972 to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964. NWLC has filed numerous *amicus curiae* briefs on employment law and civil rights issues.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of NOW

LDEF is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting employment discrimination. NOW LDEF has appeared before this Court, both as direct counsel and as *amicus*, in numerous employment discrimination cases.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1971, the ACLU Women's Rights Project has appeared in nearly every major women's rights case before this Court. A longstanding goal of the ACLU Women's Rights Project has been the elimination of barriers to women's economic equality and independence, such as employment discrimination. Toward this goal, the ACLU is dedicated to preserving the gains made by women and minorities through such key civil rights statutes as Title VII.

STATEMENT OF THE CASE

Sanderson Plumbing Products makes toilet seats and covers. At the time of his discharge, Roger Reeves was 57 years old, and had worked for the company for 40 years. He was the supervisor of the "regular line" in the Hinge Room, under department manager Russell Caldwell. Caldwell also supervised Joe Oswalt, who was 35 years old and ran a "special line" in the Hinge Room. Pet. 2a.

In the Fall of 1993, Powe Chesnut (then the Director of Quality Control, and married to Ruth Sanderson, the company President) placed Reeves on a 90-day probation because of productivity problems on his line. In the Summer of 1995, Caldwell told Chesnut (now the Director of Manufacturing) that the Hinge Room again had production problems, and blamed them on excessive absenteeism and tardiness. An audit revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt. Dana Jester, Vice President of Human Resources, confirmed these findings. "Armed with these results, Chesnut, Jester, and Vice President of Operations Tom Whitaker, recommended to Company President Sandra Sanderson that Caldwell and Reeves be dismissed. Ms. Sanderson—who was 52 years old at the time—heeded this advice, firing both Caldwell and Reeves in October 1995. Thereafter, Sanderson filled Reeves's position, on three successive occasions, with men in their thirties." Pet. 2a–3a. Oswalt had quit earlier, and Chesnut testified that he would otherwise have been "subject to dismissal." Pet. 3a n.2.

Reeves filed suit under the ADEA and won a jury verdict of $35,000 in back pay, a finding that the discrimination was willful, and liquidated damages doubling his back pay. The district court awarded $28,490.80 in front pay, and denied the company's motion for judgment as a matter of law. Pet. 4a. The company appealed, and the Fifth Circuit reversed.

Reeves relied on four strands of evidence. These are set forth below, along with the Fifth Circuit's reasons for deciding that each was not probative of discrimination. *First*, Chesnut

allegedly made two age-biased statements several months before Reeves was fired: "namely (1) that Reeves was so old that he 'must have come over on the Mayflower,' and (2) that he was 'too damn old to do the job.'" Pet. 3a–4a. The Fifth Circuit held that this was not probative because "these comments were not made in the direct context of Reeves's termination," Chesnut was just one of the persons making the discharge recommendation to Chesnut's wife, and there was no evidence suggesting that the other decisionmakers were motivated by age bias. Pet. 9a.

Second, the company's explanation for Reeves' discharge changed over time. At the time, Reeves was told that he had been fired because he had caused a specific employee to be paid for time she had not worked; at trial, the defendant claimed that the plaintiff's timekeeping mistakes had resulted in the overpayment of numerous employees. The court of appeals saw no difference in kind between the two explanations and added: "That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie." Pet. 7a–8a.

Third, Reeves put on evidence that he did not engage in inaccurate record keeping at all, explained the apparent discrepancies, and asserted that any errors were the result of Caldwell's inattentiveness. He pointed out that "at trial Chesnut was unable to testify as to the cost to the company, if any, of Reeves's alleged record falsifications." Pet. 8a. Reeves argued

that this showed Sanderson's proffered reason for his discharge to be pretextual. The court of appeals conceded that "[o]n this point, Reeves very well may be correct," but held that it must also "determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." *Id.*

Fourth, Reeves relied on evidence that he was treated less favorably than younger employees. Oswalt testified that Chesnut treated Reeves like a child. In addition, Oswalt, then in his early thirties, was not put on probation in 1993 despite similar production problems on the special line in the Hinge Room. "Likewise, argues Reeves, when Quality Control initiated its investigation of his timekeeping records in 1995, none of the supervisors from other departments were singled out for such scrutiny." Pet 9a. The Fifth Circuit held that this did not prove age discrimination, because Oswalt was also accused of inaccurate record keeping. *Id.*

In reversing the trial court and rendering judgment for the company as a result of its "plenary review," Pet. 10a, the Fifth Circuit also relied on the facts (1) that the company President was 52, (2) that Jester was 56, and (3) at the time of the discharge, "20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's." Pet. 9a–10a.

SUMMARY OF ARGUMENT

The inferential model of proof has been applied widely across the field of employment discrimination law, and has worked as well for ADEA cases as for other types of cases. It

should continue to be available in age cases.

Because few wrongdoers admit discrimination, the standards under which an inference of discrimination can be drawn from circumstantial evidence govern the disposition of the vast majority of civil rights cases. If those standards are set too high for ordinary claimants with meritorious claims, they will be unable to prove the merits of their claims. The inferential model already requires plaintiffs to engage in significant discovery of the defendant and its officials as to pretext, and raising the evidentiary bar makes plaintiffs' task far harder, even as the discovery rules impose increasing limits on discovery. Thus, only claimants with extraordinary proof will be able to prevail. Such a regime of adjudication frustrates the Congressional intent of providing a make-whole remedy for victims and deterring future acts of discrimination.

The lower court's limitations on the probative value of discriminatory remarks, its failure to consider the more favorable treatment of a younger employee, and its presumption that discrimination did not occur because some members of a protected class are in management, all impermissibly tilt the process of adjudication in favor of the defendant.

The decision below is an illustrative example of a regime of adjudication constructed by several Circuits, placing the bar of proof too high. They have unjustifiably limited the evidence that can be considered probative of discrimination, and have routinely substituted their own inferences for the inferences that could reasonably be drawn by a jury. The lower courts that

have adopted a "pretext-plus" standard for the determination of claims of discrimination under the inferential model, and those courts that have adopted an adequacy-of-evidence standard coupled with limitations on the probative value of evidence, have misapplied the teachings of of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), misunderstood their limited roles under Rules 50 and 56, and failed to respect the restrictions imposed by the Seventh Amendment.

Where the evidence is sufficient to justify a jury inference that the defendant has presented a "nondiscriminatory reason" that is not the defendant's actual reason, the intent of Congress can be fulfilled only by allowing the case to proceed to trial, and according strong presumptive finality to the jury's decision to draw the further inference of discrimination. The jury's decision should be overturned only in limited circumstances, as is done in other cases. Plaintiffs' verdicts in civil rights cases should not be singled out for heightened review.

ARGUMENT

A. The *McDonnell Douglas / Burdine / Hicks* Model Should be Followed in Age Discrimination Cases

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), this Court left open the question whether claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, could properly be resolved under the burden-shifting, inferential model of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dept.*

of Community Affairs v. Burdine, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

We urge the Court to follow the same model in ADEA cases as it has followed in cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Where there is no direct evidence of discrimination, the lower courts have found the inferential model useful in resolving claims under 42 U.S.C. §§ 1981 and 1983,[2] under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, where the defendant denies basing its decision on disability[3] or the claim involves retaliation,[4] under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*,[5] under the First Amendment where the plaintiff is a public employee and the defendant denies that the challenged action was taken because of the plaintiff's

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[2] *E.g.*, *Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998); *Lawrence v. University of Texas Medical Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999).

[3] *E.g.*, *Marshall v. Federal Express Corp.*, 130 F.3d 1095, 1099–1100 (D.C. Cir. 1997); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121–22 (5th Cir. 1998); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998); *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1021 (8th Cir. 1998); *Butler v. City of Prairie Village*, 172 F.3d 736, 747 (10th Cir. 1999).

[4] *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 753 (9th Cir. 1998), *modified in other respects*, 196 F.3d 979 (9th Cir. 1999).

[5] *E.g.*, *Lawrence v. University of Texas Medical Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999); *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998).

speech or association,[6] in retaliation cases under the Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*,[7] in constitutional-tort cases against Federal officials,[8] and in ADEA cases.[9]

The reception given by the lower courts to the *McDonnell Douglas / Burdine / Hicks* inferential model of proof reflects their shared judgment of its utility in helping to winnow meritorious cases from those that lack merit. Describing *McDonnell Douglas*, a leading commentator stated that this Court "deliberately used this case as the occasion and the vehicle for the promulgation of a general rule designed to bring order to a chaotic situation that had developed within the lower courts." Lex K. Larson, 1 Employment Discrimination (2d ed., Matthew Bender, New York, NY, 1999) § 8.01[1] at 8–5. He stated that the formula "is entitled to unusual weight at any point where it might be relevant." *Id.*

The use of the inferential model in ADEA cases has been

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[6] *E.g.*, *Whitaker v. Wallace*, 170 F.3d 541, 544 (6th Cir. 1999).

[7] *King v. Preferred Technical Group*, 166 F.3d 887, 892 (7th Cir. 1999).

[8] *Duffy v. Wolle*, 123 F.3d 1026, 1035–37 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

[9] *E.g.*, *Cardona Jimenez v. Bancomerico de Puerto Rico*, 174 F.3d 36, 40–41 (1st Cir. 1999); *Ross v. Univ. of Texas*, 139 F.3d 521, 525 (5th Cir. 1998); *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 n.19 (8th Cir. 1998); and *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1165 (10th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 617, 142 L. Ed. 2d 556 (1998).

successful, and parallels its use under Title VII. Larson, 8 Employment Discrimination § 135 at 135–1 to 135–56; Barbara Lindemann and Paul Grossman, Employment Discrimination Law (3d ed., Bureau of National Affairs, Washington, D.C., 1996) 586–96; Richard T. Seymour and Barbara Berish Brown, Equal Employment Law Update, Spring 1999 Edition (Bureau of National Affairs, Washington, D.C., 1999) at 14–263 to 14–525. While fine-tuning is an essential part of the inferential model, there is risk of undesirable confusion across the field of employment law if numerous ADEA cases are to be subject to standards departing sharply from those of the inferential model.

B. Some Courts Have Improperly Insisted on Standards of Evidence Effectively Requiring Direct Proof of Discrimination

This is not to say that further clarification is unnecessary. Some courts have applied the inferential model in ways that raise the plaintiffs' burden of proof higher than many plaintiffs with meritorious claims can reach. As a result, a large number of cases are thrown out by judges under Rules 50 and 56, Fed. R. Civ. P., and meritorious cases are among them.

This Court has noted that proving discriminatory intent "is both sensitive and difficult," and has recognized that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). *Accord, Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 1552, 143 L. Ed. 2d 731 (1999) (racial redistricting case; "Outright admissions of impermissible

racial motivation are infrequent and plaintiffs often must rely upon other evidence."). The courts of appeals, including the Fifth Circuit, have often recognized the unavailability of direct evidence and the need to rely on circumstantial evidence.[10]

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[10] Several Circuits have emphasized the rareness of cases involving direct proof of discrimination, and the corresponding need to rely on inferential proof. *Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) ("Because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence."); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) (*en banc*) ("Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence. . . . [D]irect evidence of an employer's motivation will often be unavailable or difficult to acquire."), *cert. denied*, 521 U.S. 1129 (1997); *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996) ("only rarely will a plaintiff have direct evidence of discrimination. Gone are the days (if, indeed, they ever existed) when an employer would admit to firing an employee because she is a woman, over forty years of age, disabled or a member of a certain race or religion."); *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir.), *cert. denied*, 522 U.S. 1016 (1997) ("Direct evidence of an employer's discriminatory intent is rare; therefore, plaintiffs must ordinarily prove their claims through circumstantial evidence."); *Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998); *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 449 (5th Cir. 1996); *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 40 (5th Cir. 1996) ("direct evidence of discrimination is rare"); *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997) ("Direct evidence of discrimination is rare."); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997) ("In effect, the district court placed a nearly impossible burden on Kline

Unfortunately, some of these courts have not heeded the resulting holding of *Aikens* that plaintiffs are not required to submit direct evidence of discriminatory intent. 460 U.S. at 716. The court below stated: "To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." Pet. 6a (footnote omitted). There are numerous similar decisions suggesting strongly that a jury cannot draw a reasonable inference of discrimination from adequate evidence that a proffered reason is a sham, but can only draw the inference if the plaintiff also produced evidence pointing directly at the unlawful motive.[11] One *en banc* court

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requiring direct evidence of discrimination. Rarely can discriminatory intent be ascertained through direct evidence because rarely is such evidence available."); *Mills v. First Federal Savings & Loan Ass'n of Belvidere*, 83 F.3d 833, 841 (7th Cir. 1996) (remarks revealing hostility to older workers are "'rarely found'"; citation omitted); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1332 (8th Cir. 1996); *Shealy v. City of Albany*, 89 F.3d 804, 806 (11th Cir. 1996) ("direct evidence of intent is often unavailable").

[11] *E.g.*, *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 460, 465–67 465 (1st Cir. 1996) (holding that there was not enough evidence to justify an inference of racial discrimination, although the jury could reasonably find (a) that the employer had departed from its otherwise uniform practice in denying short-term disability benefits to an African-American employee, (b) that the denial of disability benefits occurred before the results of an independent medical examination were known, (c) that the employer had rigged the independent medical examination, and (d) that the employee's supervisor — who was involved in the decision — had repeatedly complained that "you people" are lazy); *Mulero-Rodriguez v. Ponte, Inc.*,

has not only held that something more is often needed to justify a finding of discrimination, but did so on the basis that employers should frequently be excused from making false statements

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98 F.3d 670, 675 (1st Cir. 1996) (holding that the Title VII plaintiff had shown enough evidence that the defendant's proffered reasons for firing him as General Manager were pretextual, and that the question then became whether he could prove that the real reason was discrimination based on his Puerto Rican national heritage); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 98 (2d Cir. 1999) ("the district court ultimately did not err in granting judgment as a matter of law on Norville's age discrimination claim because Norville produced no evidence that the hospital's reasons, even if pretextual, served as pretext for age discrimination"); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 200 (2d Cir. 1999) (affirming summary judgment to the defendant) ("We need not decide whether Hollander offered enough evidence to establish that Cyanamid used his allegedly poor interpersonal skills as a pretext for its true reason for terminating him. Assuming arguendo that he did, this is far from the end of the matter, for to survive summary judgment Hollander had to show not only pretext, but also *either use of a pretext that itself implies a discriminatory stereotype, or use of a pretext to hide age discrimination.* This, he did not do." (emphasis in original)), *cert. denied*, __ U.S. __, 120 S. Ct. 399 (1999); *Nichols v. Lewis Grocer*, 138 F.3d 563, 566 (5th Cir. 1998) (the plaintiff can prevail only "if the record as a whole (1) creates a fact issue as to whether Supervalu's stated reason was what actually motivated it to deny Nichols the promotion *and* (2) creates a reasonable inference that sex was a determinative factor in that selection" (emphasis in original)); *O'Sullivan v. Minnesota*, 191 F.3d 965, 969–70 (8th Cir. 1999) ("Even if we agreed with O'Sullivan that LSC did not convey the true reason for her layoff, summary judgment is still proper" because there was no adequate evidence pointing to gender discrimination); *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124, 1128 (8th Cir. 1999) (holding that the plaintiff cannot prevail merely by discrediting the employer's proffered explanation. "Spencer must also prove that the proffered reason was a pretext for age discrimination.").

in judicial proceedings.[12] One Circuit has imposed a test of "substantial evidence" that the employer's proffered nondiscriminatory reasons are not the real reasons, before plaintiffs can escape the need to show greater evidence of intentional discrimination.[13] Adding to the confusion, these cases are sometimes inconsistent with other cases in the same Circuits.[14]

These Circuits seem to misunderstand their role in the review of jury verdicts under the inferential model. *Hicks* taught that "a reason cannot be proved to be 'a pretext *for*

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[12] Without identifying any record basis for its holding, *Fisher v. Vassar College*, 114 F.3d 1332, 1346–47 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998) stated that "employers characteristically give false explanations for employment decisions for many different reasons," that the stronger the evidence of discrimination, the more likely that the reason for the false explanation is to conceal discrimination, and that the weaker the evidence of discrimination, "the less reason there is to believe that the employer's false statement concealed discrimination, as opposed to the numerous other reasons for which employers so frequently give false reasons for employment decisions." In light of Rule 11, Fed. R. Civ. P., and other efforts to impress on counsel the need to perform adequate factual investigations to ensure that representations to a court are reliable, it is difficult to comprehend why defendants who fail to perform an adequate investigation — and therefore put on evidence that is untrue — should be protected from the consequences of their failure. *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d at 1069.

[13] *E.g.*, *Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 337 (5th Cir. 1999) (holding that a jury may infer discrimination from substantial evidence that the employer's proffered reasons are false).

[14] *See generally*, Seymour & Brown, Chapter 14 (The *McDonnell Douglas / Burdine / Hicks* Model) in the Summer 1996, Spring 1998, and Spring 1999 editions.

discrimination' unless it is shown both that the reason was false, *and* that discrimination was the real reason," 509 U.S. at 515 (emphasis in original), that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination," *id.* at 511, that "[e]ven though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*," *id.* at 511 n.4 (emphasis in original), and "[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review . . . ." *Id.* at 524. Conflating all of these requirements, these courts have often in practice treated their review function as entitling them to discard evidence entirely if there is a question going to its weight, and to engage in "plenary review" of the reasonableness of the jury's drawing of the inference of discrimination. They have not paid attention to *Hicks*' caution that review of an inference drawn at a bench trial is subject to the "clearly erroneous" standard, *id.* at 524, and have similarly not heeded the holding of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), that the ultimate question of discrimination *vel non* in a bench trial is a question of fact subject to deferential review under the "clearly erroneous" standard. They have in effect misunderstood their role under *Hicks* as that of super-juries.

In an unusually candid example, *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 172 (1st Cir. 1998), noted that the question whether to grant summary judgment "is a close one because both GD and Hodgens have presented probative evidence tending to support their respective versions of the facts, on the question whether GD's reason for discharging Hodgens was legitimate or merely a pretext to retaliate against him for taking FMLA-protected medical leave," but simultaneously held that no reasonable factfinder could resolve this close case for the plaintiff.

C. The Treatment of the Discriminatory Remarks Herein Set the Bar of Proof Too High

In reviewing judgments under Rules 50 and 56, some of the Circuits have combined their high evidentiary hurdles with a refusal to allow juries to give weight to admissions of bias. There is a difference between the eminently proper goal of a system of justice that is blind, and a system that blinds itself to strong evidence of discrimination. Of course, we make no contention that all biased statements in the workplace bar the dismissal of a plaintiff's claim. Clearly, a number of factors affect the weight to be accorded such remarks:

> The probative strength of direct statements or other direct evidence of bias depends on several factors, including: (1) the lack of ambiguity in the statement or other evidence; (2) the intensity of any bias shown by the statement or other evidence; (3) the time elapsed between the statement or other occurrence and the challenged action; (4) the frequency with which such statements or other events happened, (5) whether the statements or other indications of bias came from management officials with direct or indirect power over the challenged actions, and (6) the employer's response to the statements or other incidents in question.

Seymour & Brown at 17–602 (summarizing the case law). A jury should be mindful of all these factors in weighing evidence.

However, many of the lower courts have taken from the jury the function of determining the weight to be accorded biased statements. In resolving motions for summary judgment under Rule 56 and motions for judgment as a matter of law under Rule 50, they have either weighed such evidence themselves or adopted bright-line rules barring much relevant evidence as non-probative or according preclusive effect to some types of defense evidence. In this case, for example, the court of appeals deprived the jury of its right to evaluate a statement by a key decisionmaker that the plaintiff was "too damn old to do the job" because of a number of factors that should at most have gone to its weight.

First, the court of appeals held that this and another age-related remark were not probative because "these comments were not made in the direct context of Reeves's termination." Pet. 9a. If they had been made in such a context, it would have been direct evidence of discrimination under the standards of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In the absence of any evidence that a decisionmaker

had undergone a substantial change of heart in the intervening months, the lower court's willingness to indulge in a conclusive legal presumption of a change of heart merely because of the passage of a few months bespeaks both a great reluctance to find discrimination and the height of the evidentiary bar the court has erected for plaintiffs.

Nor is this an isolated or extreme example of the Fifth Circuit's approach to judicial factfinding under Rules 50 and 56. In *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434–35 (5th Cir. 1995), the court affirmed the grant of summary judgment to the defendant, holding that the plaintiff's supervisor's remark, four years prior to her discharge, that he was going to get rid of the "cunt in the office," his scheduling of a lunch meeting at Hooter's, and a remark by another supervisor that the plaintiff was not the "best man for the job," did not combine to support an inference of sex discrimination.[15] The panel did not pause to explain why a jury should be barred from inferring that the "leopard had not changed its spots," or that the fact that it took him four years to make good on his promise did not disprove his declared motivation. Instead, *Ray* raised the evidentiary bar by holding that such remarks must be made repeatedly before they can be considered probative. *Id.* at 434.

Second, the lower court held that no reasonable jury

[15] *Sreeram v. Louisiana State Univ. Medical Center- Shreveport*, 188 F.3d 314, 321 (5th Cir. 1999), suggested that any evidence less than that in *Ray v. Tandem Computers* would automatically be insufficient to show discrimination or to prevent the entry of summary judgment for the defendant.

could find Chesnut's remarks probative because there was no proof of discriminatory remarks by all others involved in the decision. This raising of the evidentiary bar would have prevented Ann Hopkins from proceeding with her case if this Court had followed such a standard in *Price Waterhouse v. Hopkins*. The plurality did not find that all partners had engaged in stereotyping, but only that "a number of the partners' comments showed sex stereotyping at work," and that the defendant, like the respondent here, had taken no steps to prevent reliance on sex-linked evaluations. 490 U.S. at 251. Justice O'Connor concurred, stating that such evidence must be adequate to shift the burden of persuasion to the defendant, if Title VII's promise of nondiscrimination is to be enforced. *Id.* at 272–73. Juries should be free to reason as this Court did in *Hopkins*.

Third, the lower court held that no reasonable jury could find Chesnut's remarks probative because some of the decision-makers were in their 50's or 60's. This raising of the evidentiary bar would have prevented Rodrigo Partida from proceeding with his habeas corpus petition challenging jury discrimination if this Court had followed such a standard in *Castaneda v. Partida*, 430 U.S. 482, 499–501 (1977). Instead, this Court rejected the argument "that human beings would not discriminate against their own kind." *Id.* at 500. Juries should be free to reason as this Court did in *Castaneda*.

Fourth, the lower court effectively held that no reasonable jury could find Chesnut's remarks probative because there was a conclusive presumption that the defendant's officials told

the truth in saying that the younger Oswalt would have been treated as harshly as the plaintiff if he had still been employed. The court was willing to indulge the presumption even though it itself stated that Oswalt had been treated more favorably than the plaintiff the last time there had been problems in the Hinge Room. This raising of the evidentiary bar placed an insuperable obstacle in the plaintiff's path. No plaintiff could prevail in any civil rights case if the court is willing to indulge such presumptions in favor of the defendant. Particularly where there is evidence of prior disparate treatment, and even more so where the court concedes that a jury could reasonably find the defendant's reasons bogus, a jury should be free to determine for itself the credibility of exculpatory testimony.

The lower court simply ignored the evidence that the plaintiff was treated less favorably than a comparable younger employee. If this Court had followed a similar approach in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282–83 (1976), L.N. McDonald's claim would have been blocked. So, too, for Percy Green's claim in *McDonnell Douglas* itself. Juries should be free to use the same reasoning this Court used in *McDonald* and in *McDonnell Douglas*.

Other Circuits have similarly invaded the province of the jury, to the significant detriment of justice. Space permits a single detailed example here.[16] *Indurante v. Local 705,*

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[16] *See generally*, Seymour & Brown, Chapter 17 (Direct Proof and Stray Remarks) in the Summer 1996, Spring 1998, and Spring 1999 editions; I Lindemann & Grossman at 28–29.

International Brotherhood of Teamsters, 160 F.3d 364, 366–67 (7th Cir. 1998), affirmed the grant of summary judgment to the defendant in a Title VII national origin case notwithstanding statements by decisionmakers that "all the Italians were going to be fired," that "all the Italians were nothing but mobsters and gangsters," that "the plans were 'to get rid of all the Italians,'" and that "the days of the goombahs are over," because the statements were made from sixteen months before the plaintiff was fired to five months thereafter, and did not specifically refer to the plaintiff's termination or, in the "goombah" incident, to employment. *But see* the dissent by Judge Rovner, *id.* at 369: "The fact is, some plans take a good while to carry out." The court described a series of distinctions it had previously adopted, allowing it to ignore express manifestations of bias by decisionmakers ("comments about discrimination in *hiring* may not suffice if the case involves a *discharge*," *id.* at 367 (emphasis in original); comments may have to refer to the plaintiff specifically, *id.*). The court stated that the plaintiff had not adequately raised the argument that these statements constituted direct evidence, but held that they were not substantial enough evidence of pretext to require a trial. *Id.*

D. Setting the Evidentiary Bar Too High Frustrates the Purposes of the Fair-Employment Laws

It is obvious that the intent of Congress in enacting the civil rights laws can be frustrated by setting the evidentiary bar too high for persons with meritorious claims. Victims cannot receive make-whole relief, discriminators cannot be deterred, and discrimination will continue, if court-imposed limitations on

proof bar substantial numbers of victims from establishing the merit of their claims. In deciding on the approach to be followed in the future, we urge the Court to consider an intensely practical problem that affects many persons with meritorious claims: unequal ability to gather the relevant facts.

In most employment discrimination cases, the plaintiffs cannot file suit already in possession of the facts with which they can prove the merit of their claims. Usually, only the employer knows the true basis for its actions. Because of the press of numerous charges of discrimination and inadequate funding, the investigation of such charges by government agencies is often superficial, leaving the charging party with few additional facts.[17] In addition, pre-Complaint investigations by counsel are often necessarily incomplete, because State ethics rules frequently bar plaintiffs' counsel from interviewing the decisionmakers. Thus, plaintiffs are ordinarily dependent on discovery to learn the defendant's reasons for the challenged action, to discover whether there are reasonably comparable employees of a different race or gender or age who were treated more favorably, to determine whether there are factors that affect their comparability or explain the differences in treatment, to explore the bases of each nondiscriminatory reason the defendant will proffer, and to look for evidence to rebut those

[17] *See*, for example, the findings in *New York State National Organization for Women v. Pataki*, 189 F.R.D. 286, 305–11 (S.D. N.Y. 1999) (holding that the defendant officials violated the Due Process Clause of the Fourteenth Amendment by the New York State Human Rights Division's problematic intake and processing of complaints).

reasons.

It is very difficult to accomplish these tasks, mounting an effective case under the traditional *McDonnell Douglas* model, let alone meet the demands of heightened evidentiary hurdles like those imposed below. Accomplishing these tasks is far harder than it might seem because, even if the additional evidence demanded by the heightened evidentiary hurdles actually exists, the plaintiff may not be able to learn of such evidence because of the increasingly restrictive presumptive limits on discovery.[18] A much earlier Fifth Circuit highlighted the problems limitations on discovery cause to employment-discrimination plaintiffs in *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 306–07 (Former 5th Cir. 1973). Discussing the lengthy exculpatory testimony of Charles Babcock, the company's Personnel Manager, the court stated:

> On cross-examination of Babcock, Burns' counsel was obviously unable to ask intelligent, informed questions relating to any specifics. Perhaps the information sought by their interrogatories would have served to bolster Babcock's exculpatory testimony in behalf of the Company. Then again, it might have allowed plaintiff's

[18] *See generally* the 1993 Amendments to the Discovery Rules, 146 F.R.D. 401 and the further restrictions now under consideration by this Court. Both the current and the proposed presumptive limits on discovery facially apply to all parties alike, but in practice impose far more severe problems on plaintiffs because they take no account of the parties' disparate access to the probative facts, and ignore the allocation of the burden of persuasion.

> counsel to pin the witness down to some unexplainable particulars. We do not know. The point is that open disclosure of all potentially relevant information is the keynote of the Federal Discovery Rules. In this case, that focal point has been ignored.

The court observed that, without the relevant background information in a racial discrimination case, justice "could not — as she *must* — be color blind." *Id.* at 307 (emphasis in original).

We urge that the evidentiary bar be set no higher than ordinary victims can reasonably be expected to reach, in light of their original lack of access to the facts and constraints on their ability to obtain evidence from their adversaries. Setting an accessible standard was the intent of this Court in handing down *McDonnell Douglas* and its progeny, and the lower courts should be directed to return to that functional standard.

E. In the Absence of Compelling Circumstances, the Jury Should Be Allowed to Draw an Inference of Discrimination or Retaliation from Evidence that the Proffered Nondiscriminatory Reason Was Not the True Reason for the Challenged Action

There is an undeniable tension between safeguarding the proper role of the jury under the Seventh Amendment to the Constitution and safeguarding litigants from arbitrary decisions by particular juries. It is essential that there be some review of the jury's decision to draw — or not to draw — the inference of discrimination from evidence that the employer's proffered

reason is not the real reason for the challenged action. *Hicks* made clear that there would be review of the jury's decision. 509 U.S. at 524. At the same time, it is equally clear that the "adequacy of the evidence" standard has too often led to judges substituting their own weighing of the evidence for that of the jury, while indulging every possible inference in favor of the defendant. The heightened review of jury findings and inferences drawn by juries in employment discrimination cases, without giving weight to all permissible inferences in favor of the verdict-winner, needs to be scaled back to the traditional limited but constitutionally permissible review of such findings and inferences in other cases, as exemplified by *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 (1944), and comparable cases.

In balancing these competing concerns, it is important to bear in mind that the constitutional role of the jury reinforces the decision of Congress that juries, not judges, should perform the primary tasks of determining credibility and weighing the evidence. 29 U.S.C. § 626(c)(2) (ADEA); 42 U.S.C. § 1981a(c) (Title VII and certain claims under the ADA and the Rehabilitation Act of 1973, 29 U.S.C. § 794a, where common-law damages are sought). There are sound policy reasons for Congress's allocation of roles. Juries are immersed in the workaday world; they know how offices and factories operate, and bring to their evaluations of the evidence a common sense rooted in the experience of their everyday lives.

Judges are far better equipped than juries to declare and apply the law, but it is no disrespect to the judiciary to draw the

conclusion that they may be less well-equipped than juries to understand the real dynamics of a workplace. *See Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) ("Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, perceptions, and implicit communications"). These considerations are not consistent with the "plenary review" in which the lower court indulged.

We suggest the following workable test for review of the jury's determination whether to draw the inference of discrimination. Where there is enough evidence to justify a jury in discrediting the defendant's proffered nondiscriminatory reasons for the employment action in question, the jury should be free to decide whether to draw the further inference of discrimination. Its decision should be overturned only in rare cases, for compelling reasons not involving a re-weighing of evidence or a presumption as to the credibility of any witness. For example, an inference of discrimination could justly be overturned where the plaintiff discredited the defendant's proffered reason by showing the defendant's true reason, which was also nondiscriminatory, *e.g.*, *Newton v. Cadwell Laboratories*, 156 F.3d 880, 882 (8th Cir. 1998) (the court found there was no pretext where the plaintiff admitted in her deposition that the defendant's employment decisions were motivated not by gender, "but by whether a prospective employee could sell Cadwell's products effectively"), or that the defendant took

reasonable steps to be well-informed but based its decision on a good-faith but mistaken view of the facts, *e.g.*, *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 289 (7th Cir. 1999); *Roberts v. Separators, Inc.*, 172 F.3d 448, 452 (7th Cir. 1999), or that the defendant has shown that reasonably comparable employees of the allegedly favored group were treated identically to the plaintiff so that there was no disparate treatment to be explained, *e.g.*, *Cowan v. Glenbrook Security Services, Inc.*, 123 F.3d 438, 446 (7th Cir. 1997). This test is consistent with *Tennant* and the Seventh Amendment jurisprudence of this Court, and would curb the heightened review of jury findings and inferences in which some Circuits have engaged.

Absent such extraordinary circumstances, the defendant's proffer of an incorrect explanation should justify a jury's inference of discrimination. We submit that it would do no good to clarify the proper role of a court under Rule 50 if the case will never reach the jury because the same errors will be committed under Rule 56 to an even greater extent than they now are committed. To safeguard the ability of a jury to exercise its discretion whether to draw the further inference of discrimination, we urge that the opinion of this Court emphasize that summary judgment should be denied wherever the evidence is sufficient to justify a jury inference that the defendant has presented a "nondiscriminatory reason" for the challenged action that is not the defendant's actual reason.

Finally, we urge the Court to provide guidance to the lower courts, to ensure that they give due regard to the Seventh Amendment and not "search the record for conflicting circum-

stantial evidence in order to take the case away from the jury," a practice this Court forbade in *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. at 35, but which has too often become the norm. Eric Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237 (1989). Such guidance will do much to assuage the fears of "many attorneys" that "disfavored plaintiffs are apt to be hustled out of the courthouse," and that "this is often the fate of employment discrimination plaintiffs." Hon. Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1938–39 (1998) (citing the findings of three Circuits' task forces on perceptions of race and gender bias in the courts). She, too, urged that a reassessment of summary-judgment practice was in order, "lest it develop too casually into a stealth weapon for clearing calendars." *Id.* at 1898.

CONCLUSION

Amici pray that the decision below be reversed, that the Court provide further guidance as suggested herein, and that the Congressionally-ordained role for civil rights juries be restored.

Respectfully submitted,

Daniel F. Kolb
Charles T. Lester, Jr.
Co-Chairs
Norman Redlich,
Trustee
Barbara R. Arnwine
Thomas J. Henderson

Richard T. Seymour*
Teresa A. Ferrante
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave. NW
Suite 400
Washington, DC 20005
Telephone: 202-662-8600

Elaine R. Jones
Director-Counsel
Theodore M. Shaw
Norman J. Chachkin
Charles Stephen Ralston
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
Telephone: 212-219-1900

Dennis C. Hayes,
General Counsel
National Association for the Advancement of Colored People
4805 Mt. Hope Drive
Fifth Floor
Baltimore, Maryland 21215
Telephone: 410-486-9191

Antonia Hernandez, President
Theresa Fay-Bustillos
MALDEF
634 South Spring Street
Eleventh Floor
Los Angeles, CA 90014
Telephone: 213-629-2516

Judith L. Lichtman
Donna R. Lenhoff
National Partnership for Women & Families
1875 Connecticut Ave. NW
Suite 710
Washington, DC 20009
Telephone: 202-986-2600

Marcia D. Greenberger
Judith C. Appelbaum
National Women's Law Center
11 Dupont Circle N.W.
Suite 800
Washington, D.C. 20036
Telephone: 202-588-5180

Martha F. Davis
NOW Legal Defense and Education Fund
395 Hudson Street, 5th Floor
New York, NY 10014
Telephone: 212-925-6635

---

* Counsel of Record.

Sara L. Mandelbaum
Steven R. Shapiro
American Civil Liberties
Union
125 Broad Street
New York, N.Y. 10004
Telephone: 212-549-2611

Attorneys for Amici Curiae

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No. 99-536

IN THE
Supreme Court of the United States

ROGER REEVES,
Petitioner,
v.
SANDERSON PLUMBING PRODUCTS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MARSHALL B. BABSON *
STANLEY STRAUSS
KRISTOFER K. STRASSER
M. LAVAN GREEN, JR.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855
Counsel for the Chamber of Commerce of the United States of America

* Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 140,000 companies and several thousand

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simulaneously with this brief with the Clerk of this Court.

other organizations such as state and local chambers of commerce and trade professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations and employment litigation.[2]

According to the United States Department of Justice, Bureau of Justice Statistics, job bias lawsuits filed in United States District Courts soared from 6,936 in 1990 to 21,540 in 1998. Civil rights complaints of all varieties more than doubled from 1990 to 1998 from 18,793 to 42,354. Employment cases alleging discrimination in hiring, promotion, firing, pay, or privileges because of an employee's race, color, religion, sex, national origin, age, or exercise of rights under Title VII accounted for 65% of the overall increase in civil rights cases.[3] Given this

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[2] *See, e.g., Kolstad v. American Dental Ass'n*, —— U.S. ——, 119 S. Ct. 2118 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1995); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 116 S. Ct. 450 (1995); *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068 (1994); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 114 S. Ct. 835 (1994); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1707 (1993).

[3] *See* Marika F. X. Litras, Ph.D., *Civil Rights Complaints in U.S. District Courts, 1990-98*, Bureau of Justice Statistics Special Report (Jan. 2000).

explosion in employment litigation, it is imperative for this Court to act as "guardian of the gate" and reaffirm the standard of proof that a disgruntled employee must offer in a discrimination case to survive a motion for summary judgment or judgment as a matter of law. Otherwise, the district and appellate courts will find themselves entangled in every personality conflict, workplace squabble, and adverse employment action, with the resulting trivialization of the laws enacted to eradicate discrimination under Title VII.[4]

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[4] *See, e.g., Keegan v. Dalton*, 899 F. Supp. 1503 (E.D. Va. 1995). In *Keegan*, the court, in granting summary judgment for the defendant, chastized plaintiff for being yet another entrant in a tiresome parade of meritless discrimination cases. In doing so, the court also entreatied the legal community as a whole "to pause and reflect during their prefiling inquiry and continually as they nurse the case to maturity, whether they can identify any tenable basis for a claim of discrimination other than their client's skin color, age, religion, or gender." 899 F.Supp. at 1515. The court also noted that the legal community's failure to do so would foster a "culture of victims," stating:

> This Court does not have the power to prevent the rain from falling into anyone's life, and is not about to intercede in every work-place squabble. Where, as here, the law offers no remedy, the responsibility for recovering from the occasional affronts of office life falls at the feet of the complainant. Thus, a person who clings steadfastly to the belief that she has been unjustly wronged, when all the evidence suggests otherwise, risks more than a judicial defeat. She also imperils her own ability to rise above the normal setbacks of life and renders herself ill-prepared to face the next inevitable pitfall. And this self-inflicted wound is far more damaging.
>
> To those souls who still labor under the heavy hand of illegal work-place discrimination, the doors of this Court will remain ever open. The pretenders, though, must learn to wrest control of their own lives from deleterious circumstances without seeking recourse from the courts.

Id.

This case presents the Court with the opportunity to reaffirm its longstanding rule, most recently pronounced in *St. Mary's Honor Ctr. v. Hicks,* that a plaintiff alleging employment discrimination bears the burden of proving discrimination. It is not enough for a plaintiff merely to present evidence *or even to prove* the lesser fact that the employer's proffered reason for its conduct is not credible. Rather, the plaintiff must prove, based upon the totality of the evidence, that discrimination is the real reason for the employer's conduct.

The present case is an attack on this longstanding rule. Both the Petitioner and the *amici* supporting his position make it very clear that their goal is to reduce the burden on plaintiffs so that they do not have to prove discrimination. They propose a standard wherein a plaintiff can avoid summary judgment or prevail before the jury with claims that do nothing more than challenge the employer's reason for its conduct. Their standard, however, is not grounded in this Court's precedent, nor in any sound policy designated to root out employment discrimination.

SUMMARY OF THE CASE

Petitioner, Roger Reeves ("Reeves"), worked for Respondent, Sanderson Plumbing Products, Inc. ("Sanderson"), for forty years. Sanderson discharged Reeves for poor performance and record-keeping improprieties. Reeves filed suit claiming age discrimination. The jury found in favor of Reeves, and the district court denied Sanderson's motion for judgment as a matter of law or, in the alternative, for a new trial.

On appeal, the United States Court of Appeals for the Fifth Circuit concluded that Reeves did not prove a violation of the ADEA by a preponderance of the evidence. Specifically, the appellate court found that although a

reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual, the jury could not determine that Reeves presented sufficient evidence that his age motivated Sanderson's employment decision. Accordingly, the Fifth Circuit reversed the district court's order and rendered judgment in favor of Sanderson. In so doing, the Fifth Circuit stated:

> . . . whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

Op. at 8(a).[5]

SUMMARY OF THE ARGUMENT

From *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L. Ed. 668, 93 S. Ct. 1817 (1973), to *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993), this Court's repeated instruction has been that the plaintiff must prove that he has been the victim of intentional discrimination. Some courts, however, have disregarded the Court's clear guidance and have instead allowed plaintiffs to proceed to the jury with evidence that does no more than discredit the employer's reason for its conduct. Thus, in applying the *McDonnell Douglas* framework, these courts have allowed plaintiffs to succeed by showing that an employer's defense was merely pretextual, and without showing that the pretext was a cover for discriminatory motivation and action; and they have been labeled "pretext-only" courts, while those requiring a showing of both

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[5] References to the Court of Appeals' opinion below are to the page numbers in the Petitioner's Appendix.

falsity and discrimination have been labeled "pretext-plus."[6] The nomenclature, however, is highly misleading and only serves to obscure the focus of the issue. That focus is on the question of whether a plaintiff may prevail merely by challenging the employer's reason (Rule 56 summary judgment stage) or establishing the falsity of the employer's reason (Rule 50 judgment as a matter of law stage).

Those courts that have responded affirmatively to the latter question, and thereby have allowed plaintiffs to prevail in employment discrimination cases, erroneously have circumvented the teaching and principle of *McDonnell Douglas* and *St. Mary's*. The positions of such courts cannot be sustained either reasonably or logically. Further, the terms "pretext only" and "pretext plus" that some courts use when considering discrimination cases are inappropriate labels that have no place in the application of the *McDonnell Douglas-St. Mary's* standard.

In the case before the Court, the Fifth Circuit applied the *McDonnell Douglas-St. Mary's* framework correctly, thereby reversing the district court's judgment, and properly dismissed the Petitioner's complaint. In so doing, the appellate court reviewed all the evidence and stated that, although the reason advanced by the Petitioner's employer to justify the Petitioner's discharge arguably could be false, nevertheless the Petitioner had not presented sufficient evidence to establish that the Petitioner was discriminatorily discharged because of his age.

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[6] In an unhelpful addition to this semantical debate, the *Amicus Curiae* Hispanic National Bar Association discusses "permissive pretext." *See* Brief, pp. 2, 3, 6-7.

ARGUMENT

I. THE SUPREME COURT SHOULD NOT ALTER THE ESTABLISHED RULE THAT A PLAINTIFF HAS THE ULTIMATE BURDEN OF PROVING HE IS THE VICTIM OF INTENTIONAL DISCRIMINATION.

In *St. Mary's*, the Court reaffirmed its longstanding approach to employment discrimination cases. Recognizing that a plaintiff will rarely have access to direct evidence of discrimination, the Court held that he may avail himself of the shifting burdens framework established by the Court in *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).

Under this approach, a plaintiff must first prove his *prima facie* case by a preponderance of the evidence. *St. Mary's*, 509 U.S. at 506. The *prima facie* case then creates a presumption of discrimination which places the burden on the employer to come forward with a "legitimate, nondiscriminatory reason" for its conduct. *Id.* at 507. This burden on the employer, however, is only one of production of admissible evidence. *Id.* "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* (quoting *Burdine*, 450 U.S. at 253).[7] Once the employer articulates its legitimate, nondiscriminatory reason, the "shifted burden of production [becomes] irrelevant." *St. Mary's*, 509 U.S.

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[7] The Solicitor General's brief takes the completely unsupportable position that when confronted by a *prima facie* case, there are only two plausible responses—discrimination or a proffered legitimate, nondiscriminatory reason. Hence, a false or incorrect proffered reason must be discrimination. *See* Brief, pp. 19-20. This faulty rationale would clearly change the employer's burden of production —to articulate a legitimate, nondiscriminatory reason for its conduct—to one of persuasion.

at 507. The plaintiff then must prove that he was the victim of intentional discrimination:

> The plaintiff then has the "full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," [*Burdine*] at 256, 67 L.Ed.2d 207, 101 S. Ct. 1089, *and* that race was. He retains that "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination."

St. Mary's, 509 U.S. at 507-508 (emphasis supplied).[8]

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[8] The Solicitor General also places too much evidentiary value on the *prima facie* case. *See* Brief, p. 16. Thus, the Solicitor General's position relies on the erroneous assumption that if the evidence supporting the *prima facie* case is sufficient to support a presumption, then it must be sufficient to support a judgment of discrimination. On that premise, the Solicitor General makes the easy, but incorrect next step that because a plaintiff is already armed with sufficient evidence to support his case, when he then proves the falsity of the employer's stated reason for its conduct, he is entitled to a judgment. But the Solicitor General's assumption is directly contrary to the evidentiary purpose of a presumption as stated in Federal Rule of Evidence 301 ("a presumption imposes . . . the burden of going forward with evidence . . . but does not shift to such party the burden of proof . . ."). Moreover, this Court has recognized that absent the presumption derived from this elemental portion of the case, the *prima facie* case in an employment discrimination action has little evidentiary value and "is infinitely less than what a directed verdict demands." *St. Mary's*, 509 U.S. at 515. Many courts have recognized how easy it is to establish a *prima facie* case. *See, e.g., Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 165 (1st Cir. 1998); *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *Kahn v. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); and *Villanueva v. Wellesley College*, 930 F.2d 124, 127 (1st Cir. 1991). Therefore, the Solicitor General's bootstrapping argument that continues to rely on the strength of a presumption which eventually drops from the case is faulty, and provides a wholly insufficient basis for the conclusion that the plaintiff should be entitled to a judgment.

Recognizing the above-outlined burdens on the parties, the issue arises over what happens when the plaintiff comes forward with evidence and proves that the employer's articulated reason is not the true reason. *St. Mary's* makes it clear that, "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false and that discrimination was the real reason." *St. Mary's*, 509 U.S. at 517 (Court's emphasis). It is true that the Court in *St. Mary's* stated that the elements of the *prima facie* case and falsity *may* be sufficient to demonstrate intentional discrimination. *Id.* at 511. However, as the Court further noted, "*there must be a finding of discrimination.*" *Id.* at 511 n.4 (Court's emphasis). In other words, there may be cases in which the quantum and quality of evidence of the *prima facie* case (not the presumption), together with the evidence of falsity, will support a finding of discrimination. But, there also may be cases in which this evidence, in the context of the whole case, is not sufficient to sustain the plaintiff's ultimate burden.[9]

The holding in *St. Mary's* rests on the solid foundation that the plaintiff's ultimate burden is to prove intentional discrimination. Accordingly, a lesser showing of only the falsity of the employer's reason is not sufficient to carry

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[9] Given this Court's clear requirement that a plaintiff must prove both falsity and real discrimination to show pretext, it is disingenuous for some courts to latch on to the above-quoted language as an excuse to reduce plaintiff's burden to one that only requires him to show the falsity of the employer's articulated reason. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996) (*en banc*). However, although highly critical of the requirement that a plaintiff prove discrimination in addition to falsity, even the Third Circuit appears to recognize that a given case may present evidence in the *prima facie* case and of falsity that is strong enough "to support a verdict of discrimination." *Id.* at 1069. Therefore, even though the Third Circuit is labeled as

the day. *St. Mary's*, 509 U.S. at 512-514. Thus, a court is without authority to impose liability without a positive finding of actual employment discrimination. As this Court stated:

> But nothing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id. at 514-515.

Clearly, it is "absurd" to argue that requiring a finding of actual discrimination in addition to the falsity of the proffered explanation will protect dissembling employers. *Id.* at 521.[10] First, it does not necessarily follow that parties who may not be believed on one issue are "liars and perjurers" on all issues. *Id.* at 520. Were the rule otherwise, then most every civil trial should be followed by the loser's trial for perjury.

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a "pretext-only" court, principally because of its vehement rejection of the "pretext-plus" approach, the court seems to follow the *St. Mary's* instruction of examining all the evidence to determine if the evidence will support a finding of discrimination.

10 Several of the *amici curiae* briefs contend that this Court's requirement that plaintiffs prove both the falsity of a proffered explanatory reason and actual discrimination will have the effect of encouraging defendant employers to avoid liability by deliberately lying. *See* Brief of the Hispanic National Bar Association, pp. 16-17; Brief of Lawyers' Committee for Civil Rights Under Law, *et al.*, pp. 14-15; Solicitor General's Brief, p. 19. But this argument is neither novel, nor is it compelling. Simply put, the same issue was raised by the dissent in *St. Mary's* and was effectively rebutted by the Court majority. *See St. Mary's*, 509 U.S. at 520-521. And one may not reasonably assume that the only inference that may be drawn from a successful challenge to the proffered reason is a finding of discriminatory motive.

Second, as this Court has recognized, where the employer is a company required to present evidence concerning the states of mind of a group of individuals, it simply does not make sense to incorporate concepts of perjury; and even if the employer engages in a deliberate lie, this would be insufficient to establish liability, for as the Court has pointed out, "Title VII is not a cause of action for perjury." *Id.* at 520, 521. In *Fisher v. Vassar College*, 114 F.3d 1332, 1346 (2nd Cir. 1997), the *en banc* Second Circuit also considered and rejected this very argument, aptly stating:

> But factfinding (and review for clear error) are not moral judgments; they are exercises in logic as applied to the observation of human behavior. The issue is not whether we disapprove of the defendant's lack of candor; it is whether the plaintiff has proven discrimination. If a party's conduct fails to give logical support to the finding of a fact in issue, that fact may not be found merely because we disapprove of the conduct. A court should not enter judgments for unproved, nonexistent discrimination to express its disapproval of a party's giving inaccurate explanations in court.

Third, to single out one employer falsehood—that offering an explanation for its conduct—as entitled to decisive weight just makes no sense. This Court itself took cognizance of the matter in the context of lying plaintiffs and noted that ". . . the plaintiff is permitted to lie about absolutely *everything* without losing a verdict he otherwise deserves." *St. Mary's*, 509 U.S. at 521 (Court's emphasis).

Finally, *St Mary's* does not require that the plaintiff present direct evidence of discrimination. 509 U.S. at 518-519. For a plaintiff must only produce evidence of

intentional discrimination sufficient to sustain a verdict in his favor. Obviously, the whole point of the *McDonnell Douglas* framework is that the plaintiff may not have direct evidence of discrimination. Nonetheless, it has never been suggested that he should be foreclosed from court relief on this basis. To the contrary, the plaintiff has the whole spectrum of circumstantial evidence and statistical evidence from which to draw and thus satisfy the burden of proof placed upon him.

In sum, *St. Mary's* merely established an elementary rule that a plaintiff, to succeed, must prove intentional discrimination. If his evidence in developing a *prima facie* case is strong enough, he may rely on it in addition to evidence that the employer's proffered reason is false. However, if the *prima facie* case is weak, or if the proof of falsity is itself conjectural, then the plaintiff may not prevail on this evidence alone. Accordingly, we respectfully submit that the Court should now reaffirm this basic premise of employment discrimination law, and should reject the rationale of those courts that would allow a plaintiff to prevail merely because he succeeds in proving the employer's reason to be false.

The Fifth Circuit, we further submit, applied the correct standard in the present case. The Company maintained that Reeves was terminated for poor record keeping. The appellate court concluded, however, that Reeves was able to present sufficient evidence to cast doubt on that reason. Nonetheless, Reeves did not prevail because he did not offer the quantum and quality of evidence necessary to prove that the real reason for his termination was age discrimination. Op. at 9(a)-10(a).[11] Thus, the appellate court reasoned that age-related comments

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[11] *See supra* note 5.

by one of three decision makers were not made in the context of the termination, and that the other two decision makers, who were not tainted by such comments, were themselves both over age 50. Further, the court noted that two other employees were also accused of improper record keeping and one was only age 35. Finally, the evidence established that numerous company managers who were not terminated were over age 50, including several over age 60.[12] In this posture of the case, the trial court was properly reversed, and the Fifth Circuit properly held that the plaintiff had not presented sufficient evidence to prove intentional discrimination.[13]

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[12] The *Amicus Curiae* National Employment Lawyers Association criticizes courts for using what it terms "logically dubious counter-inferences." *See* Brief, pp. 24-29. NELA is thereby referring to employer defenses which have been recognized in virtually every circuit—defenses such as the "same actor defense" and the "same group defense." NELA's position is that because plaintiffs have difficulty winning cases, the court should change, and lessen, their burden of showing pretext without having to show discrimination. NELA would further strengthen the plaintiff's position by eliminating employer defenses. Contrary to NELA's characterizations, these defenses are not "silver bullets." They are simply logical inferences which, while strong if unrebutted, are easily rebutted with sufficient, relevant evidence. Plaintiffs often lack this evidence, not because they cannot obtain it, but because it does not exist. Nonetheless, merely because a plaintiff does not have evidence to rebut a proffered defense is certainly not a sufficient reason to deny the employer the opportunity to use that defense, or not to accord it its logical weight under the particular circumstances of the case.

[13] The Solicitor General contends that the Fifth Circuit acted improperly because it overruled a jury verdict in favor of Reeves. *See* Brief, pp. 26-30. The contention, of course, is untenable. Were the Solicitor General's argument in this respect given weight, the effect necessarily would be to undermine, if not eliminate entirely, explicit powers given to courts of appeals by Rule 50(b) of the Federal Rules of Civil Procedure—*i.e.*, the powers, under the Rule's paragraphs (1)(B) and (C), to order a new trial or to direct entry of judgment as a matter of law "*if a verdict was returned* (emphasis supplied)".

II. THE SUPREME COURT SHOULD REJECT THE ERRONEOUS DISTINCTION BETWEEN PRETEXT-ONLY AND PRETEXT-PLUS COURTS.

Petitioner in the present case argues that there is a split in the circuits on the issue of pretext-plus or pretext-only. Commentators have written extensively on the subject.[14] The circuits do seem to fall into at least two camps on the issue—often labeling themselves as one or the other.[15] There is even now a third group, calling itself "hybrid-pretext."[16] Nonetheless, neither the distinction between these terms, nor the premise that underlies them, is well founded and should be rejected by the Court.

There is only one appropriate term that captures the applicable rule—*i.e.*, "pretext for discrimination." Thus "pretext-only" is an inappropriate term because it omits the second half of the equation and does not answer the question of "pretext for what." The same is true of

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[14] *See, e.g.*, R. Alexander Acosta and Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 Tex. Rev. L. & Pol. 207 (1998).

[15] Those circuits which purport to follow the "pretext-plus" approach include *Hidalgo v. Overseas Condado Ins.*, 120 F.3d 328 (1st Cir. 1997); *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc); *Vaughan v. Metrahealth Co.*, 145 F.3d 197 (4th Cir. 1998); and *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc).

Those circuits which purport to follow the "pretext-only" approach include *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc); *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 120 (7th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993); *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995); and *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997).

[16] Those circuits which have been labeled as following a "hybrid-pretext" approach are *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*), and *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328 (8th Cir. 1996).

the term "pretext-plus." Significantly, that term does not appear in the Court's opinion in *St. Mary's*, because the premise of the opinion is that "pretext for discrimination" requires, now as it always has, both elements—falsity and discrimination. Thus, there can be no "plus." It was rather the dissent which used the "plus" term in a pejorative sense to criticize the majority opinion (*St. Mary's*, 509 U.S. at 535-536), arguing that by requiring the plaintiff to show that discrimination was the real reason for the employer's action, the Court has somehow added to the plaintiff's burden. *St. Mary's*, we submit, correctly rejected this approach.

Importantly, moreover, most of the appellate courts that have adopted the "pretext-plus" approach, even if their adoption has been explicit, have done so in a way that demonstrates their commitment to examine all of the evidence to determine if the plaintiff has made a showing of intentional discrimination. For example, in *Gillins v. Berkeley Elec. Co-op, Inc.*, 148 F.3d 413 (4th Cir. 1998), the Fourth Circuit assumed, as did the Fifth Circuit here, that the plaintiff made a sufficient showing that the reason offered by the employer for his demotion was false. Nonetheless, the plaintiff did not prevail because he offered no evidence that the real reason for the demotion was discrimination, and, the employer had previously demoted two white employees to the same position. Thus, there was no evidence to suggest that the plaintiff was discharged because of his race, and therefore, summary judgment was appropriately entered.

In another case, the Eighth Circuit has tried to carve out a middle ground between "pretext-plus" and "pretext-only." *See Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328 (8th Cir. 1996), where that court stated:

> Thus, the [*St. Mary's*] Court recognized that in some cases the overall strength of the *prima facie* case in

> conjunction with evidence of pretext will be sufficient to permit a finding of intentional discrimination, while in other cases the *prima facie* case in tandem with evidence of pretext will not be sufficient to permit a finding of intentional discrimination.

Id. at 1334-1335.[17] On this standard, the court held that the plaintiff failed to meet his burden of proof; and applying the "same actor defense," the court said that "[t]hese facts run counter to any reasonable inference of discrimination based on age." *Id.* at 1337. Accordingly, because the plaintiff failed to offer any evidence to rebut the latter defense or to establish that he was the victim of discrimination, the court found for the employer.

Comparing the *Rothmeier* and *Gillins* decisions, it is clear that both courts did the same thing. Both presumed a *prima facie* case and sufficient evidence of falsity; and both then looked at the evidence and concluded that there was an insufficient basis for finding unlawful discrimination. Oftentimes, the labels of "pretext-plus" or "hybrid-pretext" are meaningless. Taken together, these cases amply demonstrate that there is no need to resort to labels which obscure the crucial inquiry, that is, whether the plaintiff has in fact proven intentional discrimination. The Court, we submit, should adhere to its rule in *St. Mary's*, and thereby maintain the focus on an examination of whether the plaintiff has submitted sufficient evidence to demonstrate that he was indeed the object of intentional discrimination.

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[17] For other circuits that have adopted this so-called hybrid-pretext approach, *see Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*), and *Woods v. Friction Materials, Inc.*, 30 F.3d (1st Cir. 1994). *See also* Pettigrew, *Employment—Aka v. Washington Hosp. Ctr.: The District of Columbia Circuit Seeks Middle Ground in the Pretext-Only/Pretext-Plus Debate*, 29 U. Mem. L. Rev. 863 (1999).

CONCLUSION

The Court should affirm the Fifth Circuit below and in so doing, affirm, whether by means of a sufficiently strong *prima facie* case or by other evidence, direct or circumstantial, that the correct inquiry is whether the plaintiff has proven by a preponderance of the evidence that he is the victim of intentional discrimination. In so doing, the Court should make clear that the falsity of an employer's proffered defense does not, in and of itself, establish the requisite proof of discrimination.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

MARSHALL B. BABSON *
STANLEY STRAUSS
KRISTOFER K. STRASSER
M. LAVAN GREEN, JR.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855
Counsel for the Chamber of Commerce of the United States of America

February 7, 2000

* Counsel of Record

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IN THE
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ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

ANN ELIZABETH REESMAN
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, L.L.P.
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

February 2000

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent Sanderson Plumbing Products, Inc. before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 320 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding the proof needed to support a claim of employment discrimination. Petitioner and his *amici* contend that casting doubt on the employer's articulated reason for its employment decision is sufficient to support a jury finding of discrimination. The Fifth Circuit ruled correctly that a determination of whether an unlawful discrimination motivated an employment decision is an "essential final step" for an appellate court reviewing such a verdict. Pet. App. 8a.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in a variety of cases before this Court and the United States Courts of Appeals. As part of this *amicus* activity, EEAC has briefed a number of other cases before

this Court involving the standard of proof in intentional discrimination cases, including *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Sanderson Plumbing Products, Inc. (Sanderson), which manufactures toilet seats and covers, employed Petitioner Roger Reeves as supervisor of the "regular line" in the "Hinge Room." Pet. App. 2a. Reeves' job included keeping records of the attendance and punctuality of the employees under his supervision. *Id.* Reeves reviewed the records for accuracy, then passed them on to Russell Caldwell, his supervisor, who sent them to Data Processing. *Id.*

In 1993, a study by the company's Department of Quality Control, which was run by Powe Chestnut, revealed productivity problems on Reeves' line. Reeves was placed on 90 days probation. *Id.* at 2a-3a.

In 1995, Caldwell told Chestnut, now Director of Manufacturing, that employee absenteeism and tardiness again were making it difficult for the Hinge Room to meet its production requirements. *Id.* at 3a. Since the attendance records showed nothing out of the ordinary, Chestnut

asked the current Manager of Quality Control, Lucille Reeves, to audit the Hinge Room's time sheets. *Id.* The audit exposed many mistakes and falsifications on the time sheets by Caldwell, Reeves, and Joe Oswalt, who supervised the "special line" in the Hinge Room. *Id.* The Vice President of Human Resources, Dana Jester, reviewed the records independently and corroborated the audit's findings. Based on this information, Chestnut, Jester and Tom Whitaker, Sanderson's Vice President of Operations, recommended to Sandra Sanderson, the company president and Chestnut's wife, that Caldwell and Reeves be fired. *Id.* Had Oswalt not voluntarily left the company several months earlier, the recommendation would have applied to him as well. *Id.* at n.2. Ms. Sanderson fired Caldwell and Reeves. At the time, Caldwell was 45 years of age; Reeves was 57; Oswalt was 35. *Id.* at 2a.

Reeves filed suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, claiming that Sanderson had discharged him because of his age. *Id.* at 3a. "Reeves based his claim on two age-related statements allegedly made by Chestnut several months before Reeves' dismissal, namely (1) that Reeves was so old that he 'must have come over on the Mayflower,' and (2) that he was 'too damn old to do the job.'" *Id.* at 3a-4a. The case was tried to a jury, which found in favor of Reeves, and further found that the discrimination was willful. Sanderson then renewed its prior motion for judgment as a matter of law, and moved for a new trial. The trial judge denied both motions, and Sanderson appealed. *Id.* at 4a.

On appeal, the Fifth Circuit reversed, holding that "Reeves did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA." *Id.* at 10a.

SUMMARY OF ARGUMENT

Under this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), a plaintiff who has established a prima facie case of discrimination, as that term is used in this context, cannot survive summary judgment or judgment as a matter of law merely by casting doubt on the employer's articulated reason for its action. Once the presumption of discrimination raised by the prima facie case has been rebutted by the employer's articulated reason, it is as if it never existed. A plaintiff can prevail only by proving the ultimate fact of discrimination. Where no reasonable jury could infer discrimination from the evidence presented, it is the trial court's duty to enter judgment for the defendant under Fed. R. Civ. P. 56 or 50, as appropriate. Any other outcome would be contrary to *Hicks*.

ARGUMENT

I. TO SURVIVE JUDGMENT AS A MATTER OF LAW, A DISCRIMINATION PLAINTIFF CANNOT MERELY CAST DOUBT ON THE EMPLOYER'S ARTICULATED BUSINESS REASON, BUT MUST SHOW THAT THE REASON WAS A PRETEXT FOR DISCRIMINATION

A. This Court's Precedent Requires a Plaintiff To Prove the Fact of Discrimination

Since this Court issued its decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), all twelve circuits have reviewed this Court's analysis and applied it to employment discrimination cases. Unfortunately, despite the optimistic prediction of this Court that there would not be confusion among the circuits, 509 U.S. at 512, there is a definite and distinct split of dramatic proportions.

The nub of the problem falls to one small word, "may," within one oft-cited passage:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*."

Id. at 511 (emphasis in original) (footnote omitted). Does "may" mean that a factfinder is completely free to find discrimination, even in absence of proof of the ultimate issue, if the plaintiff is able to cast some doubt on the employer's reason, as seven circuits have concluded?[2] Or,

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[2] *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*) ("a plaintiff may survive summary judgment (or in this case judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action"); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation 'unworthy' of belief."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994) ("[i]f the employer offers a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age."); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment."); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("discriminatory animus *may be inferred* from the simple showing of pretext"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997) ("a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action."), *cert. denied*, 522 U.S. 1045 (1998); *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998).

as five circuits have determined is the proper standard, does "may" mean that in some *but not all* instances, a prima facie case together with the evidence of pretext submitted by a plaintiff is sufficient to permit a finding of discrimination without a requirement of additional proof?[3] In short, does the word "may" mean "always can", or "sometimes not"?

In concurring in the denial of rehearing *en banc* in *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995),

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[3] *Woods v. Friction Materials*, 30 F.3d 255, 260 (1st Cir. 1994) ("claimant must prove *both* that the employer's articulated reason is false, and that discrimination was the actual reason for its employment action"); *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2d Cir. 1997) (*en banc*) ("[a] finding of pretext may advance the plaintiff's case, but a plaintiff cannot prevail without establishing intentional discrimination by a preponderance of the evidence."), *cert. denied*, 522 U.S. 1075 (1998); *Vaughan v. Metrahealth Cos.*, 145 F.3d 197, 202 (4th Cir. 1998) ("an employer is entitled to summary judgment unless the ADEA plaintiff has adduced sufficient evidence *both* that the reason was false, *and* that age discrimination was the real reason.") (internal quotations omitted); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*) ("a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory."); *Ryther v. Kare 11*, 108 F.3d 832, 837 (8th Cir. 1997) (*en banc*) ("evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.") (footnote omitted).

cert. dismissed, 516 U.S. 1155 (1996), Judge Williams of the District of Columbia Circuit, joined by Judges Silberman and Ginsburg, identified the problem the circuits are having:

> The word "may" is ambiguous. It might mean that the factfinder is completely free to find discrimination, in the sense that an appellate court could never reverse such a decision on the evidence. Alternatively, it might mean that in some cases the combination will be adequate to sustain a finding of discrimination, in others not, to be determined by a factfinder initially, and the appellate court on review, acording to the usual principles.

Barbour, 48 F.3d at 1281 (Williams, J., concurring in denial of rehearing). Judge Williams concurred in the denial of rehearing in *Barbour* because he believed the panel opinion to be adopting the "sometimes not" view, and thus that *en banc* review was unnecessary. *Id.* Regrettably, Judge Williams' perception was incorrect, as the District of Columbia later ruled *en banc* in *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1290 (1998). Quoting Judge Williams' *Barbour* opinion in her dissenting opinion in *Aka,* Judge Henderson, joined by Judges Silberman, Williams and Ginsburg, stated that "[g]iven the *Hicks* majority's repeated emphasis on the need to prove that an employer's proffered reason for an employment action is a *pretext for discrimination*, I can only conclude, as did Judge Williams, that the Court intended 'may' to bear the second meaning." *Aka*, 156 F.3d at 1308 (Henderson, J., dissenting).

Judge Henderson is correct. Not only *Hicks*, but the entire line of cases leading to *Hicks* emphasized continually the fundamental requirement that a discrimination plaintiff prove discrimination. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), itself, the Court

directed unequivocally that "on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup *for a racially discriminatory decision.*" *McDonnell Douglas*, 411 U.S. at 805 (emphasis added). Shortly thereafter, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court described the plaintiff's burden as requiring a showing that "race was a 'but for cause' " of his rejection. *Id.* at 282 n.10. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court directed that "[t]he plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext *for discrimination.*" *Id.* at 578 (emphasis added). Describing the effect of the *McDonnell Douglas* burden-shifting framework in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court pointed out that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253. And finally, the Court stated succinctly that despite the difficulty of proving discrimination, "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Against this background, *Hicks*, despite the much-misunderstood "may," unequivocally requires a finding of discrimination. "We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.*" 509 U.S. at 514 (emphasis in original). Merely disbelieving the employer's reason is not enough. "But nothing in law would permit us to substitute for the required finding that the employer's action

was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 514-15. Rejecting the dissent's contention that discrediting the employer's reason will suffice, the Court stated "[s]urely a more reasonable reading [of *Burdine*] is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 517. "It is not enough, in other words, to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination. *Id.* at 519 (emphasis in original).

B. The *McDonnell Douglas* Framework Is But a Method of Presenting Proof

The elements of the *McDonnell Douglas* framework must be viewed as no more than they are—a means to an end rather than the end itself. The minimal proof necessary to complete successfully the first two volleys bear this out.

Unlike a prima facie case in other areas of law, a prima facie case of discrimination, as established by this Court in *McDonnell Douglas* and its progeny,[4] constitutes only the barest minimum proof necessary to eliminate the "most common nondiscriminatory reasons for the plaintiff's rejection." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). As the Court explained in *Burdine*:

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

Id. at 254 n.7 (citation omitted). A Title VII plaintiff may establish a prima facie case:

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas at 802. The Court noted that the proof necessary to establish a prima facie case may be different in other cases, given variations in the facts. *Id.* at n.13. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 278-79 and n.6 (*McDonnell Douglas* proof requirement of membership in a racial minority was demonstrative only); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. at 311-12 (age discrimination plaintiff need not show that he "lost out" to someone outside the protected class "so long as he has lost out *because of his age*."). Indeed, several courts of appeals have held that a race discrimination plaintiff who was terminated and replaced can establish a prima facie case even though the replacement employee is a member of the same protected class. *E.g., Perry v. Woodward*, No. 97-2343, 1999 U.S. App. LEXIS 33417, at *23-26 (10th Cir. December 20, 1999) (collecting cases).

Given that the plaintiff's burden at the outset is minimal, the employer's corresponding burden to respond is likewise slight. As this Court said in *McDonnell Douglas*,

[4] While these cases arose under Title VII, this Court previously has assumed, without deciding, that the burden of proof framework they established likewise is applicable to cases arising under the ADEA. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996).

once a plaintiff establishes a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. The employer need not prove the absence of a discriminatory motive. *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978). Indeed, the employer "need not persuade the court that it was *actually motivated* by the proffered reasons." *Burdine*, 450 U.S. at 254 (emphasis added).

Under this Court's consistent precedent, once the initial exchange of volleys has been completed, the presumption of discrimination "drops from the case," *Burdine*, 450 U.S. at 255 n.10, and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255. At this point, " 'the factfinder must then decide *not . . . whether that evidence* [of the employer's reason] *is credible*, but 'whether the rejection was discriminatory within the meaning of Title VII.' " *Hicks*, 509 U.S. at 519 (quoting *Aikens* at 714-15) (emphasis added).

With the presumption gone, what is left is the evidence itself. Evidence that initially established the prima facie case may retain some persuasive force after the employer has presented its explanation, but the persuasive force is now something less than a presumption and is not necessarily enough even to permit a reasonable inference of discrimination.

C. Merely Raising a Question About the Employer's Reason Is Insufficient to Prove Discrimination

Allowing a discrimination plaintiff to survive summary judgment or judgment as a matter of law merely by raising a question of fact concerning the employer's reason ignores the fundamental principle that it is the plaintiff's burden to prove discrimination. Raising an issue of fact about the employer's reason is substantially less than proving that the reason is unworthy of credence and a pretext for discrimination. For example, discrimination plaintiffs frequently contend that the employer's articulated reason is either inadequate or incorrect. In a typical termination case, the plaintiff almost always argues that the employer's reason did not constitute sufficient grounds for dismissal. She may cite to a history of good performance ratings, or argue that the employer gave her no notice that her performance or misconduct was a problem. Even if she is right, it does not create an inference that the employer's reason is false, let alone a pretext for discrimination. At best, it constitutes an intrusion into traditional management prerogatives, which the statutes do not countenance. *See Burdine*, 450 U.S. at 259 ("The statute was not intended to 'diminish traditional management prerogatives.' ") (citation omitted).

Equally common are cases in which the plaintiff challenges the factual underpinnings of the employer's reason. For example, an employee who is dismissed based on his employer's belief that he engaged in sexual harassment may contest the factual allegations underlying the employer's belief, seeking to force the employer to prove harassment to defend against his claim of age discrimination. *E.g., Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466 (11th Cir. 1991). But even if "the complaining employees interviewed [as part of the employer's investigation into the sexual harassment allegations] were lying through their teeth," *id.* at 1470, it would not demonstrate that the employer's reason was unworthy of credence, much less that it was a pretext for age discrimination. *Id. See also Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("In other words, arguing about the accuracy of the employer's assessment is a distraction . . . because the question is not whether the employer's reasons for a decision are '*right* but whether the

employer's description of its reasons is *honest*.'") (emphasis in original) (citations omitted).

Less common, but conceivable, are cases in which the employer has articulated a reason that, albeit possible, is not the real reason for its decision. Even this will not prove the ultimate fact of discrimination. *See Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997) (*en banc*) (noting that "discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. . . . [T]he fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff."). *See also Burdine*, 450 U.S. at 256-57 (noting that the Court of Appeals erred in "plac[ing] on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff") (footnote omitted).

Ultimately, it is the structure of the *McDonnell Douglas* framework that gives rise to the misconception that a plaintiff who can cast doubt on the employer's reason has proven something.[5] First, the term "prima facie" case as used in discrimination law is misleading at best. As the Second Circuit has observed, "the essential elements of this diminished, minimal prima facie case do not neces-

[5] Indeed, the problems inherent in the *McDonnell Douglas* proof structure are significant enough that several commentators have urged that it be abandoned in favor of a less deceptively simple approach that more accurately reflects the actual burden of proof. *E.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 Brooklyn L. Rev. 703 (1995).

sarily support a reasonable inference of illegal discrimination." *Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997). Second, the employer's burden, though likewise minimal, is to articulate some reason for its action, although it need not show convincingly that it was the true reason. With these two minimal burdens met, the presumption of discrimination created by the prima facie case "drops from the case" and the "factual inquiry proceeds to a new level of specificity"—whether or not discrimination actually occurred. *Burdine*, 450 U.S. at 255 and n.10. At this point, the evidence supporting the prima facie case, coupled with evidence of pretext, *still* may not prove discrimination. Ultimately, "the question is whether the whole of the evidence mustered by the plaintiff, regardless of whether it was initially presented to establish the prima facie case or to show pretext, suffices to allow a finding that the defendant intentionally discriminated against him." *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17, 26 (1st Cir. 1998).

As the Court stated in *Hicks*:

> Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of [a legally protected characteristic]. That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of [discrimination] is correct. That remains a question for the factfinder to answer, subject *of course*, to appellate review . . . ."

Hicks, 509 U.S. at 523-24. We respectfully request the Court to clarify that, as the Fifth Circuit below correctly ruled, "a plaintiff must prove not only that the employer's

stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." Pet. App. 6a. In so doing, we urge the Court to reaffirm that a bare bones *McDonnell Douglas* prima facie case, coupled with some doubt as to the veracity or accuracy of the employer's reason, falls short of this requirement. Rather, a plaintiff must show, at the very least, that a similarly situated individual was treated more favorably and that the differential treatment was attributable to the plaintiff's protected characteristic, or present other, equally probative evidence that discrimination *actually motivated* the employer's decision. In so doing, the plaintiff "must produce evidence that clearly indicates a discriminatory attitude at the workplace and must illustrate a nexus between that negative attitude and the employment action." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999).[6]

II. TO ESTABLISH A PRIMA FACIE CASE, A PLAINTIFF BEARS THE BURDEN OF PROVING QUALIFICATIONS FOR THE JOB IN QUESTION

In clarifying the plaintiff's burden of proof, it would be helpful if the Court also would comment upon a key element of the prima facie case—the plaintiff's qualifications for the job. As noted above, *McDonnell Douglas* enumerated the generic factors that make up the plaintiff's prima facie case of discrimination. 411 U.S. at 802. While the specific requirements can vary from case to

[6] In this regard, as the Fifth Circuit correctly ruled in the instant case, stray remarks are not probative of discrimination. "[T]o prove discriminatory animus, the derogatory remark cannot be stray or isolated and '[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of [discrimination].'" *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999) (quoting *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 686 (7th Cir. 1991)).

case, *id.* at 802 n.13, the plaintiff must satisfy one basic element, no matter the context. The *McDonnell Douglas* prima facie case is aimed at eliminating "the most common non-discriminatory reasons for the plaintiff's rejection," *Burdine*, 450 U.S. at 254, one of these being the plaintiff's lack of qualifications for the job.

At the initial hiring stage, proof of qualification typically requires that the plaintiff show she had the skills, abilities, experience and training required by the employer of all applicants for the job. In termination cases, however, proof of qualification requires more. To show that she was qualified to *remain* employed, and to eliminate the most common nondiscriminatory reason for *termination*, the plaintiff must show that "at the time of the adverse employment action she was performing at a level that met her employer's legitimate job expectations." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999). *Accord Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 743 (7th Cir. 1999) (noting that as part of a prima facie case, plaintiff must show that "he was qualified for the job in question or was meeting his employer's legitimate performance expectations"); *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 929 (6th Cir. 1999) (requiring plaintiff to "show that she was performing at a level which met defendant's legitimate expectations").

This construction is supported by this Court's major decisions construing Title VII, which emphasize that simple membership in a protected group does not by itself establish a prima facie case, and that "qualification" for the position in question is crucial to surviving a motion for summary judgment or a motion to dismiss. For example, the *Griggs* decision stated:

> Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor,

> issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.* Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications rather than on the basis of race or color.

Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) (emphasis in original). *Griggs* also stated that "[a]n employer may set his qualifications as high as he likes," *id.* at 434 n.11, and that selection procedures are not forbidden if they "are demonstrably a reasonable measure of job performance." *Id.* at 436.

Picking up on the qualifications theme, the *McDonnell Douglas* decision cited further language from *Griggs* emphasizing the importance of qualifications. "Congress did not intend by Title VII, however, to guarantee a job to every person *regardless of qualifications.* In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." 411 U.S. at 800 (emphasis added) (citing *Griggs*, 401 U.S. at 430-31).

Further, the Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), stated that the employer's decision to reject a person who belongs to a racial minority does not show that the rejection was racially based. Beyond that, the *McDonnell Douglas* decision "does demand that the alleged discriminatee *demonstrate* at least that his rejection did not result from one of the most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or *relative* lack of qualifications. . . ." *Teamsters*, 431 U.S. at 358 n.44 (emphasis added).

In *Burdine*, this Court reasserted the strong emphasis on qualifications. That decision stated that "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position *for which she was qualified.*" 450 U.S. at 253 (emphasis added). Similarly, in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989), the Court set out at some length Congress' intent that the inquiry would "focus on the *qualifications* of the applicant or employee. The intent to drive employers to focus on *qualifications* rather than on race [etc.], is the theme of a good deal of the statute's legislative history." *Id.* (emphasis added). Thus, while a forbidden characteristic may not play a part in the employer's decision, "[a]ny other criterion or qualification for employment is not affected by this title." *Id.* at 244 (internal quotation omitted).

Although Respondent did not challenge Reeves' prima facie case on appeal, it is important for this Court to emphasize that the issue of qualification is part of the plaintiff's prima facie burden under the decisions of this Court.

III. MAKING EVIDENCE OF PRETEXT OR DISBELIEF OF AN EMPLOYER'S ARTICULATED REASON AN AUTOMATIC "BYE" PRECLUDING REVIEW OF A JURY VERDICT WOULD EVISCERATE RULE 50 AND NULLIFY THE GATEKEEPING FUNCTION OF THE TRIAL COURT AS WELL AS THE RESPONSIBILITY OF APPELLATE COURTS TO ENSURE THAT JUDGMENTS ARE BASED ON LEGALLY SUFFICIENT EVIDENCE

A. Since a Finding of Discrimination Is the Same as Any Other Question of Fact, It Is Reviewable by the Courts Under Applicable Standards

If the word "may" as used in *Hicks* created ambiguity for the circuits as to the effect of an issue of fact as to pretext, the small words "of course" resolve the issue of

Rule 50 and appellate review. Noting that the ultimate issue of discrimination is for the factfinder, this Court stated that such a finding was "subject, *of course*, to appellate review." *Hicks*, 509 U.S. at 524 (emphasis added).

Rather than authorizing the dismantling of Rules 56 and 50, this Court emphasized that trial courts and courts sitting in review should not treat discrimination cases any differently, either in factual determinations or in allocation of burdens and orders of proof. *Hicks*, 509 U.S. at 523-25. The trial court still has the power to determine whether the ultimate issue of discrimination has been proven and to rule on the evidence as a matter of law. *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17, 25 (1st Cir. 1998) (noting that "[t]he reasonableness of the jury making such inference [of discrimination] is subject to review under Fed. R. Civ. P. 50, just as any other finding of fact."); *Fisher v. Vassar College*, 114 F.3d 1332, 1333 (2d Cir. 1997) (holding that "in any event, a finding of discrimination, like any other determination of fact, is reviewable on appeal for clear error."). To hold otherwise would give the jury, as factfinder, unfettered discretion whenever evidence of disbelief has been adduced. Clearly, this is not the holding of *Hicks*, and this is even more apparent when the procedural context of *Hicks* is considered. In reversing the Eighth Circuit in *Hicks*, this Court did not order the Eighth Circuit to affirm the district court's findings, as it would have done if the factfinder always has the last word in evaluating pretext evidence. Instead, this Court simply reversed and remanded for proceedings consistent with the opinion.[7]

[7] Upon remand the District Court in *Hicks* entered judgment for the employer, St. Mary's Honor Center. The Eighth Circuit, in reviewing for clear error the District Court's finding of no racial discrimination, affirmed the lower court's decision. *Hicks v. St. Mary's Honor Ctr.*, 90 F.3d 285 (8th Cir. 1996).

The issue whether the employer is motivated by discrimination is reviewable like any other question of fact. After a bench trial, a trial court's finding of pretext-for-discrimination is reviewable for clear error. After a jury trial, the jury's general verdict is reviewable under the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50. And before trial, the issue may be considered on motion for summary judgment, which "mirrors" the standard used under Rule 50(a), "which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citation omitted). As this Court has stated time and again, trial courts and reviewing courts should not "treat discrimination differently from other ultimate questions of fact." *Hicks*, 509 U.S. at 524 (quoting *Aikens*, 460 U.S. at 716). That is precisely what Petitioner and the Government seek to do in this case.

B. This Court Must Preserve The Trial Courts' Duty To Winnow the "Chaff from the Wheat" to Ensure That Meritorious Claims Are Adjudicated While Unsubstantiated Ones Are Not

Petitioner and his *amici* would have every plaintiff who can meet the simple burden of a prima facie case and who can merely question the "rightness" of the employer's reason for any employment action be entitled to a trial by jury and to have a favorable jury verdict protected from judicial review. Such a rule would prevent trial judges from exercising their authority to determine whether the evidence presented is sufficient to allow a meritorious litigant to have his day in court. The standard they ad-

vocate would prevent the trial court from dismissing unsubstantiated claims that congest the system, and prevent deserving plaintiffs from having *their* day in court. Such a standard would harm, in particular, those individuals the civil rights acts were created to protect, while sheltering from the scrutiny of the trial court those disingenuous litigants who abuse the system and violate the law.

Section 102 of the Civil Rights Act of 1991, Pub. L. 102-166, Title I, § 102, 105 Stat. 1072 (codified as 42 U.S.C. § 1981a) made money damges available to Title VII plaintiffs for the first time, and thus created additional incentives for individuals to file suit. Since its passage, the number of employment discrimination suits filed annually has increased almost threefold from 8,297 in 1991 to 23,735 for the twelve month period ending September 30, 1998. *See* Reports of the Proceedings of the Judicial Conference of the United States, Administrative Office of the United States Courts (1991, 1998). Thus, while these various individuals may be seeking vindication of their rights in the workplace, the deluge of discrimination suits suggests that opportunism plays a role.

Who loses under the Petitioner's view, and who stands to gain? Under 42 U.S.C. § 2000e-5(f)(5), which governs litigation of Title VII cases, Congress directed that "[i]t shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." The rule Petitioner seeks effectively takes that priority away from those it was created to protect, by permitting every plaintiff who presents evidence of pretext or questions the employer's explanation to survive a motion for summary judgment. Thus, meritorious plaintiffs will have to wait in line with others who may simply be taking their chances for the pot of gold. Such a rule also would prevent innocent employers from

defending themselves without paying the high cost of trial or potentially paying "nuisance value" to meritless cases, so as to avoid the cost. On the other hand, the guilty may take comfort in the knowledge that justice will be delayed.

Allowing the barrage of employee cases to go to the jury will lessen the impact of each individual case, as insubstantial claims are mixed with meritorious ones. Thus, plaintiffs who may be entitled to a fair and prompt adjudication of their rights may become invisible to a jury because of the glut of cases that would proceed to trial.

CONCLUSION

Were mere disbelief or pretext, in conjunction with a prima facie case, sufficient to survive a motion for judgment, the decision of the jury would be final, even without proof of discrimination. This problem is exacerbated because, unlike a judge in a bench trial, juries do not have to make specific findings of fact and conclusions of law. Under such a rule, upon review of a jury verdict, a trial court could not grant a motion for judgment as a matter of law, if there were evidence of pretext, disbelief, or possibly mere disagreement about the employer's reason. Because the trial court could not query the jury about its determination to verify some finding of discrimination, pretext alone would mandate a "win" for the plaintiff. This Court specifically rejected this approach in *Hicks* and must do so again. Mere pretext or disbelief cannot suffice in all cases to support a finding of discrimination.

For the foregoing reasons, *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be affirmed.

Respectfully submitted,

ANN ELIZABETH REESMAN
Counsel of Record
MCGUINESS NORRIS &
WILLIAMS, L.L.P.
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council

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In the Supreme Court of the United States

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

STEPHEN M. SHAPIRO
Mayer, Brown & Platt
190 South LaSalle St.
Chicago, IL 60603
(312) 782-0600

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, VA 20191
(703) 264-5300

ANDREW L. FREY
CHARLES ROTHFELD*
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

* *Counsel of Record*

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QUESTION PRESENTED

Amicus will address the following question:

Whether a court, in determining whether to grant a motion for judgment as a matter of law, should consider all of the evidence put before the jury or only that favoring the non-moving party.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 major manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. PLAC's primary purpose is to file *amicus* briefs in cases involving issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus* briefs in both state and federal courts, including many in this Court.

This case, which concerns the circumstances in which judgment as a matter of law may be entered pursuant to Fed. R. Civ. P. 50, involves an issue of considerable importance to *amicus* and its members. Petitioner contends that a court considering a motion under Rule 50 may consider only the evidence favoring the non-movant, along with "uncontroverted" evidence offered by "disinterested" witnesses that support the movant, rather than *all* of the evidence actually considered by the jury. If accepted, petitioner's approach would require courts to decide motions under Rule 50 by asking not whether a reasonable jury could decide for the non-movant on the actual record, but whether a jury could do so on a bowdlerized version of the record that has been gerrymandered to bolster the non-movant's case. Because this abridgment of the court's power to grant judgment as a matter of law would make it difficult to disturb patently irrational jury verdicts — and because such an outcome would impose substantial burdens and expense on manufacturers, sellers, and consumers — we submit this brief to assist the Court in the resolution of this case.[1]

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by *amicus* and was written entirely by its counsel.

SUMMARY OF ARGUMENT

In answering the second question presented in the petition, petitioner takes the position that, in considering a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, a court may *not* take into account all of the evidence actually placed before the jury. Instead, he submits that a reviewing court may consider only (1) evidence that is offered by the non-movant and (2) evidence supporting the movant that is *uncontroverted and offered by a disinterested witness*. This approach — which would require courts to dispose of requests for judgment as a matter of law on the basis of an artificially truncated and highly misleading version of the record — suffers from several fundamental flaws.

First, this Court already has held, in *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333 (1933), that courts must consider *all* of the evidence in resolving motions for judgment as a matter of law. That also is the practice in closely analogous areas: courts take all of the evidence into account in passing on motions for summary judgment under Fed. R. Civ. P. 56, and appellate courts do the same in reviewing district court fact-finding under Fed. R. Civ. P. 52(a). There is no justification for a different outcome under Rule 50 — as most of the courts of appeals to consider the issue have concluded.

Second, petitioner is incorrect in contending that, in light of common-law history, the Seventh Amendment precludes a court from considering all of the evidence when it acts on a motion for judgment as a matter of law. In making this argument, petitioner maintains that the 1791 equivalent of such a motion was the demurrer to the evidence, a procedural device that required the moving party to admit all of the non-movant's factual allegations. In fact, however, the common law recognized a variety of mechanisms in addition to the demurrer by which a case could be taken from the jury. And more fundamentally, the confusing and rapidly changing

character of the law in 1791 makes it both impossible and inappropriate to regard the nuances of eighteenth century practice as determinative in setting the limits on judicial oversight of the jury. Instead, the governing Seventh Amendment principle provides that courts may keep juries within the bounds of reason in determining questions of fact — and that principle surely is not violated if judges, in deciding entitlement to judgment as a matter of law, look at all of the evidence actually considered by the jury rather than at an arbitrary subset of that evidence.

Third, petitioner's position makes no sense as a matter of logic. If the proverbial forty bishops testify in favor of the party moving for judgment as a matter of law, it would be absurd for a court to disregard that evidence simply because the non-movant "controverts" it with wholly incredible testimony of his own. At the same time, it makes equally little sense to ignore incontrovertible evidence simply because it is offered by an "interested" witness. And petitioner is simply wrong in asserting that courts necessarily will balance or weigh the evidence if they consider the entire record when assessing entitlement to judgment as a matter of law. In conducting an inquiry under Rule 50, it is settled that the court must view the evidence in the light most favorable to (and must draw all inferences in favor of) the non-moving party — and the court must then answer the *legal* question whether any reasonable jury could rule for the non-movant on that view of the evidence. There is no room in this inquiry for weighing the evidence or determining the credibility of witnesses.

ARGUMENT

COURTS MUST CONSIDER ALL OF THE EVIDENCE, NOT ONLY THAT OF THE NON-MOVANT, IN DETERMINING WHETHER TO GRANT JUDGMENT AS A MATTER OF LAW PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50

Petitioner's brief reveals that there is a substantial area of common ground between the parties in this case on the second question presented in the petition for certiorari. That question asks whether a court considering a motion for judgment as a matter of law "should weigh all of the evidence or consider only the evidence favoring the nonmoving party" (Pet. i); the petition appeared to contend that only the non-movant's evidence could be considered. See *id.* at 8-9. In his brief, however, petitioner has abandoned that position, acknowledging that, in addition to evidence presented by the non-movant, a court may take into account "any uncontradicted and unimpeached evidence from disinterested witnesses produced by movant." Pet. Br. 35. But this concession does not go far enough. In our view, this Court's precedent, the relevant history, and the dictates of logic point toward a single conclusion: in determining entitlement to judgment as a matter of law, a court must consider *all* of the evidence in the case.

A. It Is Settled That The Seventh Amendment Permits Substantial Judicial Oversight Of The Jury

At the outset, it is useful to review aspects of the issue here that are not in dispute. *First*, although petitioner and its *amicus* Association of Trial Lawyers of America ("ATLA") contend that juries should be given the freest possible reign, it must be remembered that the common law *always* has made use of mechanisms to restrain juror discretion. Prior to the mid-seventeenth century, members of the jury functioned as

witnesses as well as triers of fact; they were to reach a verdict on the basis of their personal knowledge of the events at issue. See 1 W.S. Holdsworth, A HISTORY OF ENGLISH LAW 333-334 (7th ed. 1956); Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 203-205 (1988). Formal judicial review of verdicts returned by such juries was logically impossible because the jurors were expected to consider information not available to the judge.

Instead, courts relied to some degree on informal controls (such as telling a jury how to decide a case or requiring it to redeliberate when its verdict seemed suspect) and on fining juries that reached verdicts against the weight of the evidence. See Mitnick, *supra*, 32 AM. J. LEGAL HIST. at 211 & nn. 62-63; Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285-298 (1978). But during this period control of juries was principally exercised through the attaint, which involved the convening of a 24-man jury that, when a doubtful verdict had been returned, would try the first jury for perjury. "This was only logical at a time when every jury spoke out of its own knowledge of the facts involved in the case. * * * If such jurymen returned a verdict which was demonstrably false, and in spite of their own better knowledge of the facts, then it was obvious that they had committed perjury and deserved the punishment provided for attainted juries" — imprisonment, confiscation of goods, and a declaration that "'they themselves forever thenceforward be esteemed in the eye of the law infamous.'" T.F.T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW 131 (5th ed. 1956) (citation omitted). See Mitnick, *supra*, 32 AM. J. LEGAL HIST. at 209-210. This cumbersome institution never worked well, however (in part because attaint juries themselves proved unreliable), and attaint fell into disfavor by the beginning of the seventeenth century, a time when petit jurors had ceased to function as witnesses. See Plucknett, *supra*, at 132-134; Mitnick, *supra*, 32 AM. J. LEGAL HIST. at

205-212. It was "[i]n response to the crisis of jury control caused by the decline of the attaint and the prohibition against fining [recalcitrant jurors], [that] the judges turned to the new trial as a remedy for an erroneous verdict in civil cases." *Id.* at 211-212 (citation omitted). See Plucknett, *supra*, at 135-136.

Second, as this history suggests, with the abandonment of the attaint the device of granting new trials "came into common use in England" (Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 681 (1918)) and "[a] new trial would be liberally granted on the motion of a dissatisfied litigant." Langbein, *Introduction to Book III*, in III W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago facsimile ed. 1979), at vii. As long ago as the mid-seventeenth century English courts granted new trials in cases where juries returned verdicts against the weight of the evidence,[2] and the practice was settled in all English courts by the mid-eighteenth century.[3] There is no doubt that judges considered *all* of the evidence in determining entitlement to a new trial. See, *e.g.*, W. Blackstone, *supra*, at 387 (new trial if "the jury have brought

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[2] See, *e.g.*, *Wood* v. *Gunston*, 82 Eng. Rep. 864, 867 (Upper Bench 1655); *Anon.*, 83 Eng. Rep. 775 (K.B. 1661); *Anon.*, 83 Eng. Rep. 1288 (K.B. 1665); *Duke of Richmond* v. *Wise*, 86 Eng. Rep. 86 (K.B. 1671). See generally 1 Holdsworth, *supra*, at 346.

[3] See, *e.g.*, *R.* v. *Bewdley*, 24 Eng. Rep. 357, 359 (K.B. 1712); *Musgrave* v. *Nevinson*, 93 Eng. Rep. 715 (K.B. 1723); *Dormer* v. *Parkhurst*, 95 Eng. Rep. 414, 418 (K.B. 1738); *Berks* v. *Mason*, 96 Eng. Rep. 874, 874-875 (K.B. 1756); *Bright* v. *Eynon*, 97 Eng. Rep. 365, 366, 368 (K.B. 1757); *Norris* v. *Freeman*, 95 Eng. Rep. 921 (C.P. 1769). See generally T.F.T. Plucknett, *supra*, at 136 ("the work [of authorizing the order of new trials] was half done by 1700, and declared to be complete in 1757" in *Bright*); Mitnick, *supra*, 32 AM. J. LEGAL HIST. at 208-216.

in a verdict without or contrary to evidence, so that [the judge] is reasonably dissatisfied therewith"). See also *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (citation omitted; bracketed material added by the Court) (trial judge has "'discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence'"); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 311 (1966).

Third, it is of course settled that a district court may enter — and a court of appeals may direct entry of — judgment as a matter of law "in a situation where the * * * evidence [is] insufficient to support a finding of liability." *Hetzel* v. *Prince William County*, 523 U.S. 208, ___, 118 S. Ct. 1210, 1211 (1998). See *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) ("there is no constitutional bar to an appellate court granting judgment *n.o.v.*"); *Galloway* v. *United States*, 319 U.S. 372, 389-390 (1943) (affirming long-settled power of trial courts to direct verdicts). Cf. *Gasperini*, 518 U.S. at 435-436 (approving appellate review of trial court's denial of motion to set aside jury verdict as excessive). And there is no dispute about the test that governs disposition of such a motion: as the United States and EEOC explain in their brief (at 22), judgment as a matter of law must be entered when "no reasonable jury" could decide against the movant. The federal courts thus "do not follow the rule that a scintilla of evidence is enough to create an issue for the jury." C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2524, at 253 (2d ed. 1994). Instead, while the court must leave it to the jury to resolve material conflicts in the evidence, judgment will be entered (and a jury verdict set aside) when "no reasonable jury could find [against the movant] * * * on the basis of the evidence presented." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 514 (1988). See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); C. Wright & A. Miller, *supra*, § 2524, at 262-263.

B. This Court's Precedent Establishes That Judges Must Consider All Of The Evidence In Ruling On A Motion For Judgment As A Matter Of Law

Against this background, the question now before the Court is whether, in applying this reasonable juror standard, the district or appellate judge is to consider all, or only a subset, of the evidence presented to the jury. Yet that is a question this Court already has answered: in *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333 (1933), the Court expressly considered *all* of the evidence in holding that the district court properly directed a verdict for the defendant. The Court there explained that, "where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.'" *Id.* at 343 (citation omitted). In *Chamberlain* itself, a case in which the plaintiff sought compensation for injury under the Federal Employers Liability Act, the Court concluded that "no verdict based upon" the plaintiff's version of the accident

> could be sustained as against the positive testimony to the contrary of unimpeached witnesses, all in a position to see, as [plaintiff's] witness was not, the [accident]. * * * The fact that these witnesses were employees of the [defendant], under the circumstances here disclosed, does not impair this conclusion.

Id. at 342-343. See also *Southern Ry. Co.* v. *Walters*, 284 U.S. 190, 194 (1931) (considering evidence of both parties); *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U.S. 209, 216 (1931) ("We recognize the general rule, * * * that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."). In addition, more recent opinions also "strongly suggest that the Court is in fact willing to

consider all of the evidence in the record in passing on a directed verdict issue." Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 949 (1971) (citing, *e.g.*, *First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253, 277 (1968)).

This conclusion is confirmed by practice in analogous areas. The United States and the EEOC (at Br. 22-23 & n.6) thus agree that a court addressing a motion for judgment as a matter of law "must review all of the evidence," noting that judges consider "all of the evidence in passing on a motion for summary judgment under Federal Rule of Civil Procedure 56." See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). See also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 251-252 ("[i]n essence, * * * the inquiry under [Rules 50 and 56] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"). In addition, as the United States and EEOC also observe, appellate courts take into account all of the evidence in reviewing district court fact-finding under Fed. R. Civ. P. 52(a) (see *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985)), and all courts do the same when they consider motions for judgment of acquittal under Fed. R. Crim. P. 29 (see *Lockhart* v. *Nelson*, 488 U.S. 33, 41-42 (1988)). There is no justification for a different outcome under Fed. R. Civ. P. 50.

In arguing to the contrary, petitioner (at Br. 36-37) relies principally on *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949), where the Court — without citation to any authority at all — declared it "the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inferences which tend to support the case of the litigant against whom a peremptory instruction has been given." But this passage cannot bear the weight that petitioner would place upon it. For one thing, the opinion in *Wilkerson* is

more ambiguous than petitioner's passage suggests; elsewhere in the opinion the Court did address the movant's testimony, while noting the "conflict in the evidence." *Id.* at 59-60. For another, *Wilkerson* arose in the Utah state courts and the Court's opinion therefore did not address the Seventh Amendment at all. In contrast, Justice Frankfurter's concurring opinion, which discussed the Seventh Amendment and analogous state constitutional provisions, concluded that "it is the trial judge's function to determine whether the evidence *in its entirety* would rationally support a verdict." *Id.* at 65 (Frankfurter, J., concurring) (emphasis added).

Finally, commentators have been unanimous in noting that "the statement in *Wilkerson* was quite unnecessary to the result. On the disputed factual question [in the case], there was testimony of approximately equal weight on each side; on *any* test, a jury could reasonably have found either way." Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 73 (1977) (emphasis added). See Cooper, *supra*, 55 MINN. L. REV. at 948-949; C. Wright & A. Miller, *supra*, § 2529, at 297-300. And the conclusion that *Wilkerson*'s statement did not constitute a considered holding is supported by the fact that "[j]ust a few years before, the Court had explicitly considered evidence favoring the moving party in *Pennsylvania Railroad v. Chamberlain*." Currie, *supra*, 45 U. CHI. L. REV. at 73.[4] The United States and EEOC therefore surely are correct when they observe (at Br. 23 n.6) that "[r]ead in context, *

[4] Indeed, Justice Black, author of the Court's opinion in *Wilkerson* (and perhaps the Member of the Court who was most enthusiastic about an expansive reading of the Seventh Amendment) was of the view that a directed verdict should be granted when "there is in the evidence, no room whatever for honest difference of opinion over the factual issue in controversy." *Galloway*, 319 U.S. at 407 (Black, J., dissenting). He did not suggest that only the non-movant's evidence was relevant to this inquiry.

* * the language in *Wilkerson* means only that a court should not give weight to evidence that is contradicted either directly or inferentially by the non-moving party's evidence."

In addition, "it seems highly significant that statements can be found in virtually all of the federal courts of appeals that 'all' of the evidence must be considered, albeit in the light most favorable to the party opposing the motion [for judgment as a matter of law]." Cooper, *supra*, 55 MINN. L. REV. at 951. See Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 295-296 ("The general practice of the appellate courts today is to insist that the correctness of a challenged jury verdict is to be assessed by considering 'all' the evidence. * * * As a consequence of this approach, appellate panels routinely rely on the evidence of the losing party in overturning jury verdicts."). And while "[t]here are, because of *Wilkerson*, contrary statements in some of these courts," "in many of the cases * * * these contrary statements seem to have had as little bearing on the result as in *Wilkerson* itself, and in some of them it is transparent that the court then went on to consider all of the evidence." Cooper, *supra*, 55 MINN. L. REV. at 951-952 (footnote omitted; citing cases).[5] Precedent therefore establishes that courts must consider the entirety of the evidence when considering motions for judgment as a matter of law.

C. Consideration Of All Of The Evidence Is Consistent With Common Law Practice

Petitioner nevertheless asserts that common-law history precludes a court from considering all of the evidence when

[5] These aberrant statements may account for Justice White's conclusion, in a dissent from denial of certiorari, that the courts of appeals are divided on this question. *Venture Technology, Inc.* v. *Nat'l Fuel Gas Distribution Corp.*, 459 U.S. 1007, 1009 (1982) (White, J., dissenting).

it acts on a motion for judgment as a matter of law. In petitioner's view, the 1791 common law equivalent of such a motion was the demurrer to the evidence. Because that procedural device required the moving party to admit all of the non-movant's factual allegations,[6] petitioner continues, historical practice at the time of the adoption of the Seventh Amendment means that it is appropriate today to consider only the non-movant's evidence when addressing a modern motion for judgment as a matter of law. Pet. Br. 36-37. This contention, however, misunderstands both the relevant history and this Court's approach to the Seventh Amendment.

At the outset, English common law in the late eighteenth century recognized a number of mechanisms in addition to the demurrer by which a case could be taken from the jury.[7]

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[6] The party demurring to the evidence would essentially stipulate to the truth of his opponent's evidence and ask the court to determine whether that evidence failed to make out a case as a matter of law. By doing so, the movant forfeited any opportunity to submit evidence of his own; if the opponent's evidence was *not* found deficient as a matter of law, the court would issue judgment in the opponent's favor and the case would not go to the jury. Needless to say, this consequence made the demurrer a very risky proposition. See Cooper, *supra*, 55 MINN. L. REV. at 911; Scott, *supra*, 31 HARV. L. REV. at 683; Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 561-562 (1950). The demurrer's "harsh doctrine * * * probably resulted from the procedural policy underlying the entire structure of common law pleadings: namely, that every case should be reduced to a single issue either of law or of fact and then determined upon the basis of that issue." King, *Trial Practice — Demurrers Upon Evidence as a Device for Taking a Case From the Jury*, 44 Mich. L. Rev. 468, 470.

[7] The Court has indicated that the relevant common law for Seventh Amendment purposes is that of England. See *Gasperini*, 518 U.S. at 452 (Scalia, J., dissenting); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 8 (1899).

Indeed, there "exist[ed] in 1791 a practice of 'directing' juries as to the verdict which should be returned." Cooper, *supra*, 55 MINN. L. REV. at 910. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 350 n.15 (1979) (Rehnquist, J., dissenting); *Galloway*, 319 U.S. at 392 n.23; Blume, *supra*, 48 MICH. L. REV. at 560. While this procedure was not a precise parallel to the modern directed verdict, it nevertheless was "commonplace" in late eighteenth century England for courts "to instruct the jury 'that the plaintiff was entitled to recover,' or 'the plaintiff must have a verdict.'" Henderson, *supra*, 80 HARV. L. REV. at 302 (citations omitted) (citing cases). It appears "that [the jury] was bound to obey [such instructions] (as it nearly always did in ordinary civil cases)." *Ibid.* As a consequence, it seems "that as early as 1755 the legal profession considered that a judge could take the case away from the jury by such peremptory instructions." *Id.* at 303. And "[s]ince obedience [to such instructions on the jury's part] was expected and ordinarily must have followed, thereby finally terminating the case, the device is of course something considerably more potent than simply waiting for the jury's verdict and then setting it aside if against the court's views." Cooper, *supra*, 55 MINN. L. REV. at 910. In addition, English law at the close of the eighteenth century apparently was beginning to recognize a primitive version of the judgment notwithstanding the verdict. See Henderson, *supra*, 80 HARV. L. REV. at 316 (citing cases). It therefore cannot be said, as petitioner would have it, that a case could be taken from the jury only through use of the demurrer.

But there is a more fundamental problem with petitioner's effort to identify the demurrer as the specific eighteenth century procedure that corresponded to (and therefore that limits) modern directed verdict practice: the law of the time was in a state of considerable ferment and uncertainty. As

the Court explained at some length in *Galloway*, the leading decision on directed verdict practice:

> Nor were the "rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. * * * And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.

319 U.S. at 392 (footnotes omitted).

In this setting, "[t]he basic historic difficulty posed by directed verdict practices is that there had not emerged, by 1791, either the detail or more than the approximate substance of a parallel method of judicial control." Cooper, *supra*, 55 MINN. L. REV. at 909. After all, the notion that jurors were not to decide cases on the basis of their personal knowledge of the facts had developed episodically and was still relatively new. For this reason,

> "the methods of controlling the jury grew up in a haphazard sort of way. Most of them grew up at a time when the jurors still had a right to decide upon their own knowledge, as well as upon the evidence, a right which in the eighteenth century became obsolete." This pattern of growth by itself suggests that 1791 practices should not be adopted as setting the final definitions of the methods and extent of judicial control.

Id. at 910 (quoting Scott, *supra*, 31 HARV. L. REV. at 678) (footnote omitted). Indeed, by 1791 the demurrer itself was

"already antiquated," and it fell into disuse before the end of the decade. King, *supra*, 44 MICH. L. REV. at 473. See Henderson, *supra*, 80 HARV. L. REV. at 305. In light of that development, it would be peculiar indeed to make the demurrer the benchmark for all of modern directed verdict practice.[8]

Against this background, it is not surprising that the history of the Seventh Amendment reveals that its framers paid virtually no attention to the details of contemporary directed verdict practice. The most comprehensive review of the Amendment's development concluded that

> [n]owhere in the history of the Philadelphia Convention, the ratifying conventions of the several states, or the specific "legislative history" of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all.

Henderson, *supra*, 80 HARV. L. REV. at 290. While "a general guarantee of the civil jury as an institution was widely desired, * * * there was no consensus on the precise extent of its power. On the contrary, no one discussed that question in any detail." *Id.* at 299. See Cooper, *supra*, 55 MINN. L. REV. at 908. Thus, "[i]n in the last analysis there is really very little in the historical materials that can provide helpful

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[8] The "plastic and developing character of these procedural devices during the eighteenth and nineteenth centuries" (*Galloway*, 319 U.S. at 392 n.23) presents in particularly acute form a problem identified by Justice Brennan: the relevant eighteenth century English practices are "so remote in form and concept that there is no firm basis for comparison. In such cases the result is less the discovery of a historical analog than the manufacture of a historical fiction." *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 578 n.7 (1990) (opinion of Brennan, J.).

specific guidance" on the particular incidents of the jury trial that were viewed as desirable by the framers of the Amendment; "[r]esistance on the part of federalists to the basic idea of a national bill of rights was too general to permit the introduction of matters of such relatively trivial significance as * * * the precise line that should delineate the provinces of jury and judge." Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 710, 724-725 (1973).

For these reasons, the Court has never regarded the nuances of eighteenth century practice as determinative in setting the limits on judicial oversight of the jury. Instead, the Court has held repeatedly that

> "[t]he [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing." * * * "The more logical conclusion, we think, and the one which both history and the previous decisions here suggest, is that the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

Parklane Hosiery, 439 U.S. at 336-337 (quoting *Galloway*, 319 U.S. at 390, 392). See *Gasperini*, 518 U.S. at 445 (Stevens, J., dissenting); *Colgrove* v. *Battin*, 413 U.S. 149, 157 n.11 (1973); Henderson, *supra*, 80 HARV. L. REV. at 336. As Professor Scott put it some eighty years ago, "[t]he common-law practice described so painstakingly by the learned Mr. Tidd surely did not bodily become a part of the organic law of the United States." Scott, *supra*, 31 HARV. L. REV. at 670.

Under the Court's approach, developments in trial and post-verdict practice accordingly "are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791." *Parklane Hosiery*, 439 U.S. at 337. "On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment" (*id.* at 336) — devices that include the modern directed verdict and motion for judgment as a matter of law. See *ibid.*; *Gasperini*, 518 U.S. at 436 & n.20. So long as these practices preserve "'the substance of the common-law right of jury trial,'" they are "[c]onsistent[] with the historical objective of the Seventh Amendment"; this principle permits the use of "'new devices * * * to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.'" *Colgrove*, 413 U.S. at 156-157 (citations omitted).[9]

This understanding makes plain that, so far as Rule 50 and the precise question presented here are concerned, "there are no rigidly definite directed verdict standards to be found in the Constitution; a general policy of respect [for the jury] is about the most that can be developed with any secure foundation." Cooper, *supra*, 55 MINN. L. REV. at 904. In fact, "[t]he majority decision in *Galloway* * * * decisively rejected the thesis that the boundaries of the obsolete demurrer to the evidence confine the directed verdict of today." Currie, *supra*, 45 U. CHI. L. REV. at 75. See

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[9] As Professor Wolfram has explained, this approach is wholly consistent with the intent of the Seventh Amendment's drafters. "The most appealing view of the political settlement achieved by the seventh amendment is the version suggested by the argument that the term 'common law' in the seventh amendment was probably intended to refer to a process of legal development, rather than to an immutable and changeless state of the law." Wolfram, 57 MINN. L. REV. at 744.

Galloway, 319 U.S. at 392 ("It may be doubted that the [Seventh] Amendment requires challenge to an opponent's case to be made without reference to the merits of one's own and at the price of all opportunity to have it considered.").[10] Instead, "'preserv[ing] the basic institution of jury trial in its most fundamental elements'" (*Parklane Hosiery*, 439 U.S. at 336-337 (citation omitted)) requires recognition "that the constitutional province of the jury in civil cases is simply the determination of questions of fact in issue as to which reasonable men may reach different results; that the constitutional guaranty is not violated by the exercise of control by the court * * * in keeping [the jury] within the bounds of reason in determining questions of fact." Scott, *supra*, 31 HARV. L. REV. at 678. And in determining whether a reasonable juror could reach a particular result, it surely does not invade the jury's province for a court to consider all of the evidence actually considered by the jury, rather than an arbitrary subset of that evidence.

D. Disregarding A Portion Of The Evidence Considered By The Jury Would Lead To Bizarre And Unjustified Results

The historical deficiencies in petitioner's position are matched by his arguments's logical defects. He would permit a court that is reviewing a motion for judgment as a matter of law to consider only the non-movant's evidence, along with evidence supporting the movant that is uncontroverted, unimpeached, and offered by "disinterested" witnesses. Pet.

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[10] Actually, even the approaches propounded by petitioner and by ATLA depart from the demurrer, which required that "challenge to an opponent's case be made * * * at the price of all opportunity to have [the challenger's] case considered." *Galloway*, 319 U.S. at 392. Petitioner and ATLA do not suggest that a party who seeks judgment as a matter of law must forfeit any opportunity to present evidence at trial, although that is the logical consequence of their position.

Br. 35.[11] But among its many bizarre results, this approach, as Professor Currie has noted, would mean that even in the face of the proverbial "testimony of forty bishops" offered in support of the moving party, "the converse testimony of the [party opposing the motion] would preclude a directed verdict." Currie, *supra*, 45 U. CHI. L. REV. at 73. And "[i]t is, to put it gently, difficult to reconcile such results either with the rule that juries may not act unreasonably or with the underlying policy of preventing juries from undermining the law." *Ibid*. After all, "[e]vidence which considered alone may be thought substantial, may become insubstantial when the full light of all the evidence is thrown upon the scene." Blume, *supra*, 48 MICH. L. REV. at 579.

One obvious problem with the contention that all controverted testimony must be disregarded is the reality that some controverting testimony may be literally incredible. In fact, "[r]ulings that testimony which would be sufficient standing alone cannot be accepted because contrary to physical facts, even those established by other testimony rather than immutable physical law, are such familiar examples of considering evidence unfavorable to the party opposing the motion as to require no more than marginal comment." Cooper, *supra*, 55 MINN. L. REV. at 951.[12] See

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[11] It is easy to understand why petitioner has abandoned the argument that only the non-movant's testimony may be considered: "it would be absurd to apply literally a rule requiring consideration of only the parts of the evidence favorable to the party opposing a directed verdict motion." Cooper, *supra*, 55 MINN. L. REV. at 952. See *id*. at 950-952 (citing suitably absurd examples).

[12] Professor Cooper's marginal comment noted that "[o]ne of the most frequent applications of the 'physical facts' rule which does not rest on testimony beyond that of the witness is found in the common rule that testimony that the witness stopped and looked, saw there was nothing coming, and then immediately got hit by a train cannot be accepted." 55 MINN. L. REV. at 951 n.153.

C. Wright & A. Miller, *supra*, § 2527, at 285 ("it is well settled that no weight is to be given to testimony that is opposed to the laws of nature or undisputed physical facts"). Similarly, the non-movant's testimony may lack all weight because it is internally inconsistent. See, *e.g.*, *Galloway*, 319 U.S. at 385 n.11. And it makes no sense at all for a court to disregard otherwise unimpeachable evidence supporting the movant (that offered by the forty bishops, for example), simply because the non-movant generates insubstantial contrary evidence to controvert it.

At the same time, petitioner also offers no justification for a rule that would permit consideration only of evidence offered by the movant's "disinterested" witnesses.[13] In fact, this Court already has rejected such an approach, expressly taking into account the testimony of a defendant's employees in holding that a directed verdict was properly granted. See *Chamberlain*, 288 U.S. at 338-339, 342-343; *Chesapeake & Ohio Ry*, 283 U.S. at 261. That is only logical. While there often may be cases where the testimony of interested persons is entitled to little weight, it is easy to imagine circumstances where such testimony is wholly incontrovertible. And "[a] layman would think it strange to see a judge wearing blinders to keep himself from seeing more than a part of the truth reflected by the evidence in a case." Blume, *supra*, 48 MICH. L. REV. at 581.

At bottom, petitioner's contention is premised on the notion that, if courts consider all of the evidence in addressing a motion for judgment as a matter of law, they

[13] It is not entirely clear even how to apply such a test. That witnesses are willing to appear for the movant at all suggests that they are not wholly disinterested. And the manifold gradations of relationship that may exist between a party and its witnesses would appear to make application of petitioner's rule a practical impossibility.

inevitably will engage in "balancing" of the evidence, will assess the credibility of witnesses, and will end by invading the province of the jury. Pet. Br. 38-40. In our view, however, this line of argument rests on a basic misunderstanding of the inquiry conducted by courts under Rule 50. It is settled that, in such an inquiry, the evidence must be viewed in the light most favorable to (and all reasonable inferences from the evidence must be drawn in favor of) the non-moving party. See *Galloway*, 319 U.S. at 395; *Gasperini*, 518 U.S. at 443 (Stevens, J., dissenting). No one suggests that courts may weigh or balance the evidence; when there is a material "conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side." *Chamberlain*, 288 U.S. at 338. And there is no question of the court's making credibility determinations, because all testimony in support of the non-movant that reasonably could be believed is presumed to *have* been believed by the jury. Instead, what the court must do is determine whether any *reasonable* jury could find against the movant on the basis of the evidence in the case — a determination that remains legal rather than factual in nature even when the evidence considered is that of both parties.[14]

This is a point established by cases considering motions for summary judgment under Rule 56 — authority that petitioner acknowledges is fully applicable here. Pet. Br. 39-40. As we have noted, under that Rule courts consider *all* of the evidence of *both* parties, and will grant the motion when the non-movant's evidence is so insubstantial that it could not

[14] Of course, in making this determination courts must disregard evidence that should not have been placed before the jury at all, such as expert opinion that does not comport with the requirements of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This point is explored in greater detail in PLAC's *amicus* brief in *Weisgram* v. *Marley Company*, No. 99-161.

reasonably support judgment in that party's favor. "[A] court pondering a Rule 56 motion need not embrace inferences that are wildly improbable or that rely on 'tenuous insinuation'" (*National Amusements, Inc.* v. *Town of Dedham*, 43 F.3d 731, 743 (1st Cir.), cert. denied, 515 U.S. 1103 (1995) (citation omitted)). Courts thus agree that

> Federal Rule of Civil Procedure 56 empowers a court to make a threshold determination of whether a factual issue is "genuine." * * * Not every alleged factual conflict creates a "genuine" issue of material fact. As the Supreme Court points out, if the evidence creating the alleged factual conflict is "merely colorable, or is not sufficiently probative, summary judgment may be granted."

Unterreiner v. *Volkswagen of America, Inc.*, 8 F.3d 1206, 1212 (7th Cir. 1993) (quoting *Anderson* v. *Liberty Lobby*, 477 U.S. at 249-250). See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986) (expert report that is "implausible and inconsistent with record evidence" cannot defeat summary judgment); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

Under both Rule 50 and Rule 56, "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway*, 319 U.S. at 395. The reason for this requirement is plain: "[t]o permit a jury to find the facts contrary to overwhelming evidence, or upon wholly insufficient evidence, would license juries to undermine the law." Currie, *supra*, 45 U. CHI. L. REV. at 72. And as Judge Learned Hand wrote for the Second Circuit, in a case

where the court considered the evidence of both parties, "[t]he most that has been said — probably all that can be — is that there comes a point where the evidence no longer justifies any verdict but one." *Pennsylvania R.R..Co.* v. *Chamberlain*, 59 F.2d 986, 987 (2d Cir. 1932), rev'd on other grounds, 288 U.S. 333 (1933). In such circumstances, it does not invade the jury's province for the court to direct entry of judgment as a matter of law.[15]

For similar reasons, petitioner also is wrong in contending (at Br. 41-49) that a court of appeals must defer to the district court's judgment when reviewing a ruling on a Rule 50 motion. Because *both* district and appellate courts must view the evidence in the light most favorable to the non-movant, and because *neither* court may make credibility determinations in considering the motion, the role of the two courts is identical: it is to make the *legal* determination whether "the evidence presented in the * * * trial * * * would not suffice, *as a matter of law*, to support a jury verdict." *Boyle*, 487 U.S. at 513 (emphasis added). See *Neely*, 386 U.S. at 327 (question of evidentiary sufficiency to support a verdict raises "issues of law with which the courts of appeals regularly and characteristically must deal"). Needless to say, this "is solely a question of law." C. Wright & A. Miller, *supra*, § 2524, at 249 (citing cases). As a consequence, the district and appellate courts are identically situated to resolve this question, and "[t]he analysis is the same in the trial court and on appeal." *Id.* § 2524, at 251.

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[15] The court below thus applied the proper standard when it considered all of the evidence in determining respondent's entitlement to judgment as a matter of law. That is all this Court need decide to resolve the second question presented in the petition; the purely factual challenge made by petitioner and the United States to the court of appeals' assessment of that evidence was not presented in the petition for certiorari and should not be addressed by the Court.

The Court thus explained in *Neely* that the district court has "no special advantage or competence in dealing with" the issue. 386 U.S. at 327. The courts of appeals accordingly are unanimous in holding that appellate courts "review[] the district court's grant or denial of a renewed motion for judgment as a matter of law *de novo*. * * * The reviewing court's role is the same as that of the district court." *Lambert* v. *Ackerley*, 156 F.3d 1018, 1020 (9th Cir. 1998), cert. denied, 68 U.S.L.W. 3459 (Jan. 18, 2000).[16] That conclusion plainly is correct.[17]

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[16] See, *e.g.*, *Kramer* v. *Logan County School Dist. No. R-1*, 157 F.3d 620 (8th Cir. 1998); *Myers* v. *County of Orange*, 157 F.3d 66, 73 (2d Cir. 1998), cert. denied, 119 S. Ct. 1042 (1999); *Tronzo* v. *Biomet, Inc.*, 156 F.3d 1154, 1157 (Fed. Cir. 1998); *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F.3d 581, 592 (5th Cir. 1998); *Webb* v. *ABF Freight System, Inc.*, 155 F.3d 1230, 1238 (10th Cir. 1998), cert. denied, 119 S. Ct. 1253 (1999); *Failla* v. *City of Passaic*, 146 F.3d 149, 153 (3d Cir. 1998); *Criado* v. *IBM Corp.*, 145 F.3d 437, 448 (1st Cir. 1998); *Brickers* v. *Cleveland Board of Education*, 145 F.3d 846, 849 (6th Cir. 1998); *Stenograph L.L.C.* v. *Bossard Assocs., Inc.*, 144 F.3d 96, 99 (D.C. Cir. 1998).

[17] In arguing to the contrary, petitioner contends that appellate review of a district court's decision under Rule 50 must be especially deferential because jury fact-findings were not subject to appellate review at common law. Pet. Br. 41-42. But this Court already has rejected petitioner's premise, holding that "there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently there is no constitutional bar to an appellate court granting judgment *n.o.v.*" *Neely*, 386 U.S. at 321.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

STEPHEN M. SHAPIRO
Mayer, Brown & Platt
190 South LaSalle St.
Chicago, IL 60603
(312) 782-0600

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, VA 20191
(703) 264-5300

ANDREW L. FREY
CHARLES ROTHFELD*
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

* *Counsel of Record*

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In The

Supreme Court of the United States

ROGER REEVES,

Petitioner,

vs.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE ALABAMA RETAIL ASSOCIATION IN SUPPORT OF RESPONDENT SANDERSON PLUMBING PRODUCTS, INC.

JOHN J. COLEMAN, III*
*Counsel of Record
MARCEL L. DEBRUGE
THOMAS S. ROPER
YVONNE N. BESHANY
LAURA G. BLACK
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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STATEMENT OF INTEREST

The Alabama Retail Association files this Brief pursuant to Rule 37 and with the consent of the parties.[1] The Alabama Retail Association for over fifty years has served the interest of businesses that daily must meet the challenge of providing communities of all sizes with employment opportunities and customer service on the thinnest of profit margins. Its members, which number over 2,300, range in size from the smallest "mom and pop" operations to the nation's largest retailers. This case concerns whether our members must face the cost of defending discrimination claims through a trial by jury even when the claimant has been unable to offer substantial evidence that unlawful discrimination in fact occurred.

This industry, which has earned a well-deserved reputation for creating often the most viable employment opportunities for many senior citizens, is characterized by high turnover and wage scales that frequently are too low to attract sophisticated management at the retail outlet level. Yet Petitioner would have this Court require a jury trial any time a younger employee replaces an older one, and an unsophisticated supervisor at a rural outpost offers an inarticulate explanation for the decision. Aside from the unpredictable nature of Alabama juries, a subject with which this Court is all too familiar, the cost of defending even a single jury trial successfully can mean the difference between survival and bankruptcy – not simply for the small single outlets, but for the Woolco Division of F.W. Woolworth and other large chains. Surely the Age Discrimination in Employment Act ("ADEA") was not intended to destroy employment

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

opportunities for the very individuals that it was designed to protect.

The outcome of this case will affect every one of our members. While the ADEA and Alabama's state law equivalent (which has the same remedies as its federal counterpart) reaches only those members with twenty or more employees, the disposition of the issues facing the Court in this case will necessarily impact the disposition of claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, which reaches members with fifteen or more employees, and 42 U.S.C. § 1981, which reaches members with only one employee. Whether the discrimination laws are construed to prohibit discrimination, as the Respondent contends and as the Fifth Circuit found, or to mandate that every employer who cannot prove undisputed just cause for its decisions must justify its decisions to a jury, as Petitioner and supporting *amici* urge, is a matter of survival for our members and the employment opportunities that they provide.

STATEMENT OF THE ISSUES

1. Does the Age Discrimination in Employment Act mandate application of different principles of substantive law at the summary disposition stage than the principles of substantive law that apply at trial on the merits?

2. Does the Age Discrimination in Employment Act suspend Fed. R. Civ. P. Rule 50's mandate to consider the evidence submitted by both parties in the light most favorable to the nonmovant, and command instead that only the nonmovant's evidence may be considered?

3. Does the Age Discrimination in Employment Act suspend the identity of legal standards that apply at summary judgment and at Judgment as a Matter of Law in other civil actions, and compel a more deferential review be provided at the JMOL stage than is provided at the summary judgment stage?

STATEMENT OF THE CASE

ARA adopts Respondent's Counterstatement of the Case.

SUMMARY OF THE ARGUMENT

This case involves whether the federal discrimination laws require the disposition of federal discrimination actions to be governed by special rules that do not apply to other civil actions. Clearly, they do not. Neither the ADEA nor any other federal discrimination statute mandates a trial by jury absent substantial evidence establishing a genuine issue of fact on the ultimate issue of discrimination.

Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986), held that the same substantive law that governs the disposition of a discrimination claim at trial on the merits governs the disposition of the claim at summary judgment and at JMOL. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), held that the plaintiff seeking to establish liability for discrimination could not automatically prevail by showing that the articulated reason was false, but must go further and establish that the true reason was unlawful discrimination. *Hicks* applies at the JMOL stage because that decision contains the substantive law that defines the ultimate issue of discrimination at trial.

Petitioner's contention that the Court must ignore all but the plaintiff's evidence at the summary disposition stage also seeks to use the federal discrimination laws to impose special rules in derogation of those applicable to other civil cases. The issue at summary disposition is never whether the plaintiff's evidence alone creates a jury issue; it is whether in light of all the evidence, there exists a genuine issue for a jury to decide. To hold otherwise would require litigants, jurors, and an already overburdened court system alike to undergo the ordeal of a jury trial when there is nothing for the jury to decide.

Petitioner's call for a different standard of review at the JMOL stage than at the summary judgment stage

likewise abrogates settled rules of procedure to enable claims to reach a jury when there is nothing to decide. *Anderson* mandates that the same standard applies at both stages, and nothing in the ADEA or any other federal discrimination statute calls for a different result.

ARGUMENT

I. THE SAME SUBSTANTIVE LAW GOVERNING TRIAL OF A DISCRIMINATION CLAIM GOVERNS THE SUBSTANTIVE ELEMENTS AT SUMMARY DISPOSITION.

Settled procedural and substantive precedent support the Fifth Circuit's application at the JMOL stage of the same substantive law that governs age discrimination cases at trial on the merits. The same substantive elements, measures of evidence, and allocations of proof burdens that govern the disposition of a case on the merits at trial apply with equal force to summary disposition at summary judgment or JMOL.[2] The *McDonnell Douglas*[3] device established for moving the evidence to the ultimate issue of discrimination in a circumstantial evidence disparate treatment case does not alter the substantive law placing on the plaintiff the burden of proof on that ultimate issue at all stages of the case. The body of judicial wisdom that has developed since the advent of federal employment discrimination laws has found that case-by-case evaluation of all of the evidence on the ultimate issue better serves the administration of justice than rigid adherence to *per se* formulae. Adherence at the summary disposition stage to the same substantive law that governs trial does not require direct evidence to establish a jury question, but it does ensure that the evidence offered in any form will meet the substantive

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[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 316, 323 (1986).

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972).

requirements for a dispute over discrimination that will govern the jury's disposition at trial.

The Fifth Circuit correctly applied *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), to the claim below at the JMOL stage because that decision contains the substantive law that defines the ultimate issue of discrimination at trial. Petitioner's contrary position requires adherence to a *per se* rule that *Hicks* rejects. *Hicks* forbade making the assumption at trial that evidence of a *prima facie* case plus evidence disproving the employer's articulation *per se* is sufficient to support a decision for the plaintiff. *Hicks* requires proof of a pretext for discrimination, not merely proof of pretext; "[b]ut a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, and that discrimination was the real reason." 509 U.S. at 515. The circuits[4]

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[4] Petitioner – and indeed of some of the circuits themselves – state erroneously that only two or three circuits follow *Hicks* at the summary judgment and JMOL stage. *Compare Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (affirming summary judgment against age and other claims, court noted that same *Hicks* burden met at trial must be met to avoid summary judgment); *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1225 (2d Cir. 1994) (though reversing summary judgment against age claim, court declared that defeating summary judgment requires plaintiff to offer evidence that "the employer's reason for discharging her is false *and* as to whether it is more likely that a discriminatory reason motivated the employer. . . . " Emphasis in original); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) (affirming summary judgment against race claim, adopted same logic); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 370 (5th Cir. 1997) (affirming summary judgment against race and sex claims, court held that a plaintiff to survive summary judgment must "create (1) a fact issue regarding whether each of the employer's stated reasons was what actually motivated it and (2) a reasonable inference that race or sex was a determinative factor"; but court goes on to recognize that showing of pretext for discrimination, not simply pretext alone, is what *Hicks* requires); *Sullivan v. National R.R.*

declining to apply the *Hicks* requirement to the summary judgment and JMOL stages reason that the very presumption

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Passenger Corp., 170 F.3d 1056, 1061 (11th Cir. 1999) (in a case consistent with *St. Mary's*, the court reversed the denial of JMOL against a retaliation claim, expressing the pretext formulation in terms that plaintiff did not make a showing of pretext because he "failed to introduce any evidence that would have permitted the jury to legitimately draw the inference that the reasons proffered by [the employer] . . . were false ***and*** that the real reason was retaliation") (emphasis added); *Isenberg v. Knight-Ridder Newspapers, Inc.*, 97 F.3d 436 (11th Cir. 1996) (affirming summary judgment against age claim, court declared that *Hicks* should not be interpreted to make summary judgment harder); *Walker v. Nationsbank*, 53 F.3d 1548, 1557-58 (11th Cir. 1995) (affirmed JMOL against sex and age claims, finding that "the fact-finder's disbelief of the reasons the defendant offers does not compel judgment for the plaintiff.") *with Sheridan v. E.I. duPont de Nemours*, 100 F.3d 1061, 1066-67 (3d Cir. 1996) (en banc) (reversing JMOL setting aside sex verdict, court reads *Hicks* as making per se rule that plaintiff survives summary judgment by offering *prima facie* case plus evidence from which a reasonable jury can either disbelieve the articulation or believe that discrimination was more likely); *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994) (affirmed summary judgment against national origin claim, but adopted same test as *Sheridan*); *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994) (reversing summary judgment against age claim, adopts same logic and overruled portion of *Burdine*); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) (affirmed summary judgment against age claim but adopted logic identical to *Sheridan* and rejected *R.J. Reynolds*); *Gaworski v. ITT Commercial Financial*, 17 F.3d 1104, 1109 (8th Cir. 1993) (reversing JMOL against an age claim, the court followed same logic as *Sheridan*); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (reversing summary judgment against race claim, adopted same logic as *Sheridan*); *Barbour v. Merrill*, 48 F.3d 1270, 1276-77 (D.C. Cir. 1995) (affirming denial of JMOL against race claim, adopts same logic); *Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528-36 (11th Cir. 1997) (affirming summary judgment against race claim, panel offers misstatement of numerous circuits'

of liability that *Hicks* rejected at the trial stage must be applied at these earlier stages. The application of different substantive elements at these earlier stages than apply at trial not only disregards the admonition of *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986), to apply the same substantive elements at all three stages of litigation, but also ignores the consistent direction of *USPS v. Aikens*, 460 U.S. 711, 716 (1983), and *Hicks* itself, 509 U.S. at 524, that the significance of a *prima facie* case "drops from the case" when the employer offers an articulation.

Anderson, applying the constitutional malice element and the "clear and convincing evidence" proof measure to the evaluation of a summary judgment motion filed against the defamation claim of a public figure, makes clear that the same substantive elements and the same measure of proof that govern the disposition of a case at trial govern the search for issues to try at the summary judgment and JMOL stages. 477 U.S. at 254-55. *Celotex Corp. v. Catrett*, 477 U.S. 316 (1986), found summary judgment appropriate when a nonmovant asbestosis claimant offered no evidence of exposure to the defendant's product. This Court held that the party with the burden of proof on the merits at trial has the burden at the summary judgment stage of offering substantial evidence establishing a triable issue on each of the substantive elements of the claim. 477 U.S. at 323. Discrimination cases are no different. Here, as well, a claimant must meet the same substantive elements, measures of proof, and burdens of proof at the summary disposition stage as the claimant faces at trial on the merits.

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positions and analysis in dicta contrary to its own prior decisions, court at 1529 follows same logic as *Sheridan*). Some circuits are not clear. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) (affirming JMOL against age claim, court held that mere *prima facie* case was not sufficient to raise jury issue following articulation); *see Courtney*, 42 F.3d at 421-22 (same).

Hicks held that the plaintiff seeking to establish liability for discrimination could not automatically prevail by showing that the articulated reason was false, but must go further and establish that the true reason was unlawful discrimination.[5] Circuits declining to require this showing at the summary judgment and JMOL stage reason that as *Hicks* recognized that a *prima facie* case plus evidence of the falsity of the articulation could (but need not) raise a jury issue in some cases, such evidence must support the denial of summary judgment or JMOL in all cases. This approach disregards *Anderson v. Liberty Lobby* and *Celotex*.

The substantive standards defined by *Hicks* place on the plaintiff the burden of proving both that the employer's articulated reason is false *and* that the true reason is discrimination. 509 U.S. at 519. *USPS v. Aikens*, 460 U.S. 711 (1983), makes clear that the *McDonnell Douglas prima facie* case serves only as a means for advancing the analysis to the ultimate issue, not as a means for resolving that issue.[6] 460 U.S. at 716. A *McDonnell Douglas prima facie*

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[5] Thus, the Court reversed the Eighth Circuit and reinstated a district court decision finding that the articulated reason for a halfway house supervisor's termination was false (plaintiff, but not other supervisors, received discipline for subordinate errors, and the employer provoked the final confrontation causing termination), but that the presence of two decision makers of plaintiffs' race on the discipline committee, the employer's failure to discipline subordinates of plaintiff's race for the errors for which plaintiff was disciplined, and the fact that plaintiff's termination did not affect the racial makeup of the workforce justified the conclusion that race was not the reason for termination even though the employer's articulated reasons were not the reasons either.

[6] Understandably, petitioner and supporting *amici* do not deal with the holding of *Aikens*, choosing instead either to ignore the case entirely (as does petitioner), to focus upon *Aikens* statements of the obvious – that proving discrimination does not require direct evidence, *see* Lawyers' Committee for Civil Rights Amicus Brief at 14, U.S. EEOC Amicus Brief at 20,

case plus evidence questioning the articulation's veracity raise a jury issue only when they raise a genuine issue concerning whether the reason articulated is a pretext for discrimination, not simply when the evidence raises a genuine issue concerning the articulation's truthfulness. If the *prima facie* case meets the articulation's explanation and provides an alternative discriminatory explanation, then a jury issue is presented; but not every *prima facie* case can serve as substantial evidence of this alternative at the "new level of specificity" that the post-articulation stage of the analysis represents. *See* 460 U.S. at 715. Under *Aikens*, the *prima facie* case was designed only to raise a presumption rebutted by the act of articulation.[7] *Hicks* adopts the admonition of *Aikens*, 460 U.S. at 715, that when the employer articulates, the focus shifts to the ultimate issue of discrimination,[8] and the existence or nonexistence of a *prima facie* case no longer has any magical significance.

Hispanic national Bar Ass'n. Brief at 4, or to misconstrue the decision's significance, *see* ATLA Amicus Brief at 14.

[7] "Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the *prima facie* case – i.e., the burden of producing evidence that the adverse employment actions were taken 'for a legitimate nondiscriminatory reason.' " 509 U.S. at 506-7. "By establishing a *prima facie* case, the plaintiff in a Title VII case creates a rebuttable 'presumption that the employer unlawfully discriminated against' him . . . [citations omitted] . . . To rebut this presumption, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.' " 460 U.S. at 714.

[8] "At this stage, the McDonnell-Burdine presumption 'drops from the case' . . . [citation omitted] and 'the factual inquiry proceeds to a new level of specificity.' " 460 U.S. at 715. " 'The district court has before it all the evidence it needs to decide' not (as the dissent would have it) whether the defendant's response is credible, but whether the defendant intentionally discriminated against the plaintiff.' " 509 U.S. at 519 *quoting* 460 U.S. at 715.

509 U.S. at 519. The offer of a *prima facie* case calls for an articulation. If the employer meets this burden, then the presumption of discrimination "drops from the case":

> Our cases make clear that at that point the shifted burden of production became irrelevant: "If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted," Burdine, 450 US, at 255, 67 L Ed 2d 207, 101 S.Ct. 1089, and "drops form the case," id., at 255, n 10, 67 L Ed 2d 207, 101 S.Ct. 1089. The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," id. at 256, 67 L.Ed. 2d 207, 101 S.Ct. 1089, and that [age] was. He retains the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." Ibid.

Hicks, 509 U.S. at 507.

The act of articulation (veracity at this point is not in issue[9]) focuses the inquiry on the ultimate issue – whether the employer was motivated by unlawful discrimination or not. 509 U.S. at 509, 519. The employee, however, retains the ultimate burden of proving NOT that the articulation is false, but that discrimination is the true reason for the challenged action.[10] Making a *per se* jury issue out of a *prima facie* case plus evidence attacking the articulation's truthfulness changes the *prima facie* case

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[9] 509 U.S. at 518; 460 U.S. at 715.

[10] *See* 509 U.S. at 508; *compare Texas Department of Community Affairs v. Burdine*, 405 U.S. 248, 253 (1981) ("[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") *with Federal Rule of Evidence 301* (A presumption requires rebuttal; it does not shift the burden of proof).

from a presumption shifting the burden of going forward by calling for articulation to a presumption shifting the burden of proof calling for an affirmative defense. It reattaches to the *prima facie* case a significance that *Aikens* removed,[11] and accords the *prima facie* case a function that *Aikens* and *Hicks* rejected. *See* 509 U.S. at 519; 460 U.S. at 716. The petitioner should be required to prove his case – not simply offer evidence that the employer's explanation may be false without evidence that the true reason is age discrimination. *See* 509 U.S. at 519.

In addition to ignoring *Aikens*, this approach is disingenuous in that it uses *Hicks* – a decision rejecting *per se* liability rules – to impose one. *See* 509 U.S. at 519. "The analysis of the ultimate question should not be befouled or misdirected by judicial presumption." ATLA Amicus Brief at 26. Numerous decisions make clear that the evaluation of the evidence of discrimination in each case, not the mechanistic application of a per se *McDonnell Douglas* formula, offers the best means for resolving the ultimate issue of discrimination.[12] The position of petitioner and of the circuits supporting this view seek to impose such a *per se* rule – a rule that a *prima facie* case plus evidence questioning the articulation's veracity ALWAYS creates a jury issue.

The Circuits that support this "no evidence of discrimination needed" mentality often quote the following portion from *Hicks* in support of their holding: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) ***may***, together with the elements

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[11] *See* Aikens, 460 U.S. at 716 ("[N]one of this means that the trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.").

[12] *Hicks*, 509 U.S. at 519; *Aikens*, 460 U.S. at 715; *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978).

of the *prima facie* case, suffice to show intentional discrimination."[13] They rely upon the very language that rejects the per se rule that they seek to impose.[14]

The question in *Hicks* was whether the *employee* was entitled to judgment if the employee presented evidence to show that employer's proffered reasons were false. This Court held that compelling judgment for the plaintiff in this situation "disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.' " *Hicks*, 509 U.S. at 511. Further, this Court stated "that (1) the plaintiff must show *'both* that the reason was false, *and* that discrimination was the real

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[13] 509 U.S. at 511 (emphasis added); *see Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528-29 (11th Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995); *Courtney v. Biosound*, 42 F.3d 414, 418 (7th Cir. 1994); *Fuentes v. Perskie*, 32 F.3d 759, 763-65 (3rd Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *see also*, Petitioner's Brief at 24.

[14] Contrary to Petitioner's contention, Petitioner's Brief at 27-28, the application of *Hicks* at the summary disposition stage does not impose a per se rule requiring the grant of summary disposition in any case in which the plaintiff offers a *prima facie* case plus evidence challenging the articulation; it **prevents** the imposition of a contrary per se rule. As quoted above, such evidence "***may***, together with the elements of the *prima facie* case, suffice to show intentional discrimination." 509 U.S. at 511 (emphasis added). *Burdine* and *Hicks* anticipate that the evidence comprising the *prima facie* case still must be considered along with the rest of the evidence. 450 U.S. at 255 n.10, *see* 509 U.S. at 511. *Hicks* simply forecloses any suggestion that such evidence will always be sufficient to raise a jury issue concerning whether the true reason for employment action was discrimination. *Hicks* makes clear that "may" means "may" in the substantive law governing the evaluation of the ultimate issue of discrimination, and *Anderson* makes clear that if "may" means "may" at trial on the merits, "may" means "may" at the summary disposition stage.

reason,' and (2) 'it is not enough . . . to *dis*believe the employer . . . ' Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Hicks*, 509 U.S. at n. 4, 518, 519.

The disbelief of the articulation is not the same as a finding of discrimination. *Burdine* made clear that a *McDonnell Douglas prima facie* case did not shift to the defendant the burden of disproving discrimination, *Aikens* made clear that a *prima facie* case has no independent significance once the defendant has articulated, and *Hicks* made clear that mere proof of a *prima facie* case plus proof that the articulation is false did not automatically mean that the plaintiff had proved discrimination. The act of articulation rebuts the presumption raised by the *prima facie* case. Questions about the truth of the articulation necessarily must be raised to establish a jury issue of pretext, but questions about its truthfulness are not *per se* sufficient to raise a jury issue concerning pretext for discrimination in all cases. *Hicks* held that "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race." 509 U.S. at 523-24.

Circuits equating a disbelieved articulation with a jury issue of pretext rely upon a portion of *Burdine* that *Hicks* squarely rejected.[15] Although the *Hicks* majority specifically noted that this language from *Burdine* was

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[15] *See Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528 (11th Cir. 1997); *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418-19 (7th Cir. 1994); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3rd Cir. 1994); *see also*, Petitioner's Brief at 25-26. Some *amici* also mistakenly equate an issue over the articulation's believability, which *Hicks* makes clear is not sufficient in all cases, with the employer's awareness of the articulation, which *McKennon v. Nashville Banner*, 513 U.S. 352 (1995), makes clear is a different issue entirely.

inconsistent with its holding, 509 U.S. at 517, 519, virtually every circuit to confine the *Hicks* test to the trial stage quotes the *Burdine* language in 450 U.S. at 256 as though *Hicks* had never been decided.[16] The Court in *Hicks* observed that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination the much different findings that the employer's explanation of its action was not believable." 509 U.S. at 514-15. *Hicks* thus effectively overruled *Burdine*'s method of proving pretext simply by showing that the articulation was not worthy of belief.[17] This substantive change applies with equal force to the summary disposition of discrimination cases.

The Fifth Circuit's approach below remains true to the substantive and procedural decisions to which this Court has adhered in the past. Just as the *Hicks* interpretation of *Burdine* created problems with only one sentence, the Fifth Circuit interpretation of *Hicks* below offers far fewer problems than would the contrived creation urged by the petitioner. To adopt the same standard at JMOL as *Hicks* requires at trial serves the letter and spirit of *Anderson* by maintaining the consistency of elements on the merits at all stages of the proceeding, 477 U.S. at 255, serves the letter and spirit of *Aikens* by focusing upon the ultimate issue, 460 U.S. at 715, serves

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[16] *See Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528, 1536 (11th Cir. 1997); *Fuentes v. Perskie*, 32 F.3d 764-65 (3rd Cir. 1994); *Gaworski v. ITT Commercial Financial*, 17 F.3d 1104, 1109 (8th Cir. 1993).

[17] *Hicks* reversed the Eighth Circuit's rejection of the district court's conclusion that, although the articulated reasons were not the true reasons for the plaintiff's termination, the plaintiff had failed to establish that race was the reason. "[T]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of . . . [discrimination] is correct." *St. Mary's*, 509 U.S. at 524.

the letter and spirit of *Hicks* by requiring evidence of pretext for discrimination (and not just pretext), 509 U.S. at 515, and serves the letter and spirit of the law by not converting a discrimination prohibition into a just cause provision. *See* 509 U.S. at 523.

Adopting the Fifth Circuit's position has no down side. Petitioner's parade of horribles is illusory. *See* petitioner's brief at 23.[18] Applying *Hicks* at the summary

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[18] Contrary to petitioner's assertion at page 23 of his brief, some of the commentators he cites **do not** argue that direct evidence is required to defeat summary judgment in discrimination cases, and recognize that in cases involving direct evidence, summary judgment is not even a relevant consideration. *See* Frank J. Caviliere, *The Recent Respectability of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases; ADEA Analysis Through the Supreme Court Summary Judgment Prism*, 41 Clev.St.L.Rev. 103, 144 (1993) ("While 'smoking gun' evidence is not required, it has never hurt the plaintiff's case. By invoking direct evidence of age animus, a dual motive situation may arise, effectively insulating the case from summary judgment and directed verdict."). Contrary to the petitioner's argument, another commentator cited by petitioner observes that "it is not settled law that the same standard applies in ruling on a motion for summary judgment as applies on a Rule 50 motion." Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla.St.U.L.Rev. 689, 702 (1996). Other commentators cited by petitioner simply repudiate the *Anderson/Celotex/Matsushita* trilogy, characterize *Hicks* as wrong, and urge a standard for summary judgment in discrimination cases that would require employers to establish "just cause" for every challenged decision. *See* William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus" and the Escalating Subordination of Federal Employment Discrimination Law for Employment at Will: Lessons from McKennon and Hicks*, 30 Ga.L.Rev. 305, 312, 352 (1996) (Polemic attacking employment at will as an illegitimate concept in the common law and the product of influence asserted by those in society with "power, property and prerogative"; "the [Supreme] Court values

disposition stage does not require that petitioner produce direct evidence in order to show pretext. Indeed, the seminal Second Circuit decision applying *Hicks* at the summary disposition stage **denied** summary judgment under the *Hicks* standard. *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1225 (**2d** Cir. 1994) (reversing summary judgment against age claim). *Hicks* does not require direct evidence; *Hicks* simply requires creation of a jury issue on the ultimate issue of the case – the presence or absence of unlawful discrimination – by proof that the employer's articulated reason is not simply wrong, but hiding a discriminatory motive. Moreover, it is fair to say that *Hicks* would **never** involve direct evidence. While an employee could establish a jury issue either with direct evidence or using other models,[19] the *Hicks* analysis presupposes the circumstantial evidence context.

This case is not about direct evidence. Direct evidence of discrimination is evidence that establishes discriminatory intent without the need to make an

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employment at will more highly than employment discrimination law and its underlying policies."); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325 (1995) (Arguing that any restraint on a jury, e.g., summary judgment, JMOL, renewed JMOL, is the unjust product of "a power struggle along gender and racial lines."); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L.Rev. 203, 256 ("[C]ourts should require a defendant moving for summary judgment to prove more than a defendant in an ordinary civil case before the burden is shifted to the plaintiff to show that a genuine issue of material fact exists as to whether the defendant's alleged reason for its employment decision is pretextual."). These novel arguments, if accepted, would place any employment discrimination case in a separate category, virtually insulated from application of Rule 56, with the result being that all such cases will proceed to a jury trial.

[19] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

inference.[20] This case is about whether the principles of substantive discrimination law espoused in *Hicks* apply

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[20] *Fernandes v. Costa Brothers Masonry, Inc.*, 1999 WL 1252868, *8 (1st Cir. 1999) (opinion gives great review of law in every circuit; then court declares that "a statement that plausibly can be interpreted two different ways – one discriminatory and the other benign – does not directly reflect illegal animus and, thus, does not constitute **direct evidence**."); *Carey v. Mt. Desert Island Hospital*, 156 F.3d 31, 42 fn. 2 (1st Cir. 1998) ("**Direct evidence** is often said to be the 'evidentiary equivalent of a smoking gun.' "); *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2nd Cir. 1997) ("In short, to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment."); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2nd Cir. 1997) (Application of *Price Waterhouse* is triggered by "conduct or statements by person *involved in the decision making process* that may be viewed as directly reflecting the alleged discriminatory attitude."); *Connors v. Chrysler Financial Corp.*, 160 F.3d 971, 976 (3rd Cir. 1998) ("Under the standard announced by Justice O'Connor's controlling opinion in *Price Waterhouse v. Hopkins*, the evidence must be such that it demonstrates that the decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision . . . To succeed, the **direct evidence** must be 'so revealing of discriminatory animus that it is not necessary to rely on any presumption from the *prima facie* case to shift the burden of production.' "); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) ("A plaintiff qualifies for the more advantageous standard of liability applicable in mixed-motive cases if the plaintiff presents '**direct evidence** that decision makers placed substantial negative reliance on an illegitimate criterion' . . . Such a showing requires 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.' "); *Haas v. ADVO Systems, Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999) (**direct evidence** of discrimination is that which shows that the employer in question " 'actually relied on [the forbidden factor] in making its decision.' "); *Bodenheimer v. PPG Indus. Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) (**Direct evidence** cases

only to the disposition of a discrimination case at trial on the merits, or whether they apply at the summary judgment and JMOL stages as well. Those principles require proof of discrimination in order to prevail, 509 U.S. at 530-31, not proof of discrimination without inference.[21]

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are those in which the evidence would serve to prove unlawful discrimination "without any inferences or presumptions."); *Nemet v. First National Bank of Ohio*, 1999 WL 1111584, *4 (6th Cir. 1999) (**Direct evidence** of age discrimination is evidence that shows that the person that made the challenged decision, or was otherwise meaningfully involved in that decision, had an age bias or the bias affected the challenged decision. Citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989)); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) ("**Direct evidence**" is "evidence which in and of itself suggests that someone with managerial authority was 'animated by an illegal employment criterion.' "); *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999) ("**Direct evidence** is evidence of conduct or statements by persons involved in the decision making process that is sufficient for a factfinder to find that a discriminatory attitude was more likely than not a motivating factor in the employer's decision."); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) ("**Direct evidence** is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption."); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999) ("We have defined **direct evidence** of discrimination as evidence which reflects 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.' "); *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997) ("In context, the notion of '**direct' evidence** in Justice O'Connor's concurrence means only that the evidence marshaled in support of the substantiality of the discriminatory motive must actually relate to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace.")

[21] *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 426 (8th Cir. 1999) ("Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference.").

The conclusion that the same principles of substantive law apply at all stages of a discrimination case, as is the rule for the substantive law governing every other kind of case, does not require the petitioner to produce direct evidence in order to reach the jury. This conclusion merely requires that the discrimination plaintiff, like every other plaintiff, raise a triable issue of fact on the evidence as evaluated under the same substantive law that would guide the jury if the case were submitted.

The petitioner's contrary view changes the nature of discrimination law. It changes the substance of discrimination law. Changing the discrimination laws from negative prohibitions against using certain reasons for employment decisions to affirmative obligations requiring an employer accused of discrimination to justify its decision by offering evidence of a just cause contradicts the law of even the circuits declining to follow *Hicks*.[22] It changes the procedural law. Creating a per se rule that a plaintiff always defeats summary judgment and JMOL with a *McDonnell Douglas prima facie* case plus evidence that the articulated reason is false imposes a different substantive burden at summary judgment or JMOL than at trial, transforms a device for identifying articulation

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[22] This is true not only of the Fifth Circuit, *Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976), which follows *Hicks* at the JMOL stage, and the Eleventh Circuit, *see Nix v. WLCY Radio/Rahall Communications, Inc.*, 738 F.2d 1181, 1186-87 (11th Cir. 1984), which is split on the issue, but also of the Third Circuit, *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994), and the Eighth Circuit, *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994), which do not follow *Hicks* at that stage. Thus, the issue is not whether an employer must prove "just cause" to defend an employment decision under Mississippi state law, Petitioner's Brief at 28 n.19, but whether the employer must prove just cause to defend an employment decision under the federal discrimination statutes.

into a device for averting summary disposition, and changes the inquiry from "whether the defendant intentionally discriminated against the plaintiff" to "whether the defendant's response is credible" – precisely the opposite of what the law requires. *See* 509 U.S. at 519, 460 U.S. at 715; *see also*, 477 U.S. at 255.

Neither the ADEA (at issue here) nor any other federal discrimination statute was intended to create a just cause for employment action standard in the substantive law governing employment decisions. Neither the ADEA nor any other federal discrimination statute was intended to modify the procedural rules governing the evaluation of the evidence. Accordingly, the decision of the Fifth Circuit below is due to be affirmed.

II. APPLYING *HICKS* AT SUMMARY DISPOSITION REQUIRES CONSIDERING ALL RECORD EVIDENCE.

Petitioner argues that, when reviewing a lower court's grant or denial of a motion for judgment as a matter of law (i.e., directed verdict), an appellate court 1) cannot look at all of the evidence, and 2) must give some deference to the lower court's decision. Thus, according to petitioner, the Court of Appeals erred when it reviewed *all* of the evidence and applied a *de novo* standard of review. Therefore, as petitioner's argument goes, the Court of Appeals' decision that the trial court should have granted respondent's motion for judgment as a matter of law is due to be reversed and the jury verdict upheld. Petitioner also asserts that there is a split of authority among the Circuits on the issues of what evidence to look at and what standard of review to apply.

Petitioner is wrong on all three of his major points. While petitioner attempts to support his arguments by referring to this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), petitioner has misinterpreted that opinion and ignored its progeny. Indeed, with the exception of *Anderson*, every case relied on by

petitioner to support this particular argument was decided years, or even decades, before *Anderson*. It is only by citing cases which predate *Anderson* that petitioner is able to create the appearance of a split of authority among the Circuits as to the proper standard of review in the instant case. From there, of course, petitioner argues the court below erred by not applying the standard most favorable to him.

Whatever the situation prior to this Court's opinion in *Anderson*, it is clear from a review of *Anderson* and its progeny that this Court and the Circuit Courts of Appeals unanimously have held directly contrary to what petitioner claims is the correct result here. Petitioner argues that review of a trial court's decision on a motion for judgment as a matter of law is something more deferential than *de novo* review. However, every Circuit Court of Appeals has held that such review is, in fact, *de novo*.[23]

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[23] *See, e.g., Aetna Cas. & Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1556 (1st Cir. 1994) (stating that "denial of judgment as a matter of law is 'reviewed *de novo*' "); *Piesco v. Koch*, 12 F.3d 332, 340 (2nd Cir. 1993) (noting that court reviewing a grant or denial of a motion for judgment as a matter of law applies same standard, and performs same function as the trial court in determining whether to grant the motion in the first instance.); *Lightning Lube, Inc. v. Whitco Corp.*, 4 F.3d 1153, 1166 (3rd Cir. 1993) (stating "[w]e exercise plenary review of an order granting or denying a motion for judgment as a matter of law and apply the same standard as the district court"); *Scheduled Airlines Traffic Offices, Inc. v. Objective, Inc.*, 180 F.3d 583, 588 (4th Cir. 1999) (stating "[w]e review a district court's grant of judgment as a matter of law *de novo*"); *Aetna Cas. & Sur. Co. v. Pendleton Detectives of Mississippi, Inc.*, 182 F.3d 376, 377 (5th Cir. 1999) (stating "[w]e review the district court's grant of a motion for judgment as a matter of law *de novo*, applying the same standard it used"); *Snyder v. AG Trucking, Inc.*, 57 F.3d 484, 490 (6th Cir. 1995) (stating "[w]e review a judgment as a matter of law *de novo*"); *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999) (stating "[j]udgments as a matter of law are reviewed by appellate courts in the same fashion as summary judgment

Similarly, petitioner argues that the Circuits have split over what evidence should be looked at when reviewing a district court's decision on a motion for judgment as a matter of law. Based on this perceived split, petitioner argues that the correct position is that only the evidence which supports his case should be considered on appeal for purposes of determining whether the trial court's ruling on motion for judgment as a matter of law was correct. As with the issue of *de novo* review, all of the circuits are unanimously contrary to petitioner's position. Based primarily on this Court's decision in *Anderson*, the Circuit Courts of Appeals each hold that all evidence is to be considered when determining the propriety of a grant or denial of judgment as a matter of law.[24]

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motions. *Anderson v. Liberty Lobby, Inc.*, . . . We review the conclusions of the district court *de novo* . . . "); *Steckstor v. Hancock*, 984 F.2d 274, 276 (8th Cir. 1993) (stating "[b]ecause the district court's granting a directed verdict is necessarily a pure question of law, we review its propriety de novo"); *Pierce v. Multnomah County, Oregon*, 76 F.3d 1032, 1037 (9th Cir. 1996) (stating "[w]e review *de novo* the grant of a directed verdict"); *Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175, 1181 (10th Cir. 1995) (noting that review of decisions on motions for judgment as a matter of law are reviewed *de novo*); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (stating "[t]his Court reviews *de novo* a district court's denial of a motion for judgment as a matter of law"); *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1266 (Fed. Cir. 1999) (stating "[w]e review a grant of JMOL without deference to the district court"); *Barwick v. United States*, 923 F.2d 885, 889 (D.C. Cir. 1991) (reviewing denial of judgment as a matter of law *de novo*); *Atchison, Topeka and Santa Fe Ry. Co. v. Chevron U.S.A., Inc.*, 896 F.2d 561, 562 (Temp. Emer. Ct. of App. 1989) (stating "[a]ppellate review of a district court's grant of a motion for a directed verdict is *de novo*").

[24] *See, e.g., Dragon v. Rhode Island*, 936 F.2d 32, 36 (1st Cir. 1991) (stating that the court "must look at all the evidence submitted, that which favors the defendant as well as the plaintiff. If the record, as a whole, permits only one reasonable

Finally, this Court's decision in *Anderson*, standing alone, forecloses petitioners arguments as to what

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conclusion, the judge must enter a directed verdict"); *Piesco v. Koch*, 12 F.3d 332, 343 (2nd Cir. 1993) (reviewing both parties' evidence to determine propriety of trial court's denial of judgment as a matter of law); *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3 120, 129 (3rd Cir. 1998) (noting that standards for summary judgment and directed verdict are the same and the ultimate question is whether reasonable minds may differ as to the verdict based upon the evidence presented"); *Sales v. Grant*, 158 F.3d 768, 775 (4th Cir. 1998) (noting that directed verdict is proper if there is only one conclusion a reasonable jury could draw from the evidence presented); *Aetna Cas. & Sur. Co. v. Pendleton Detectives of Mississippi, Inc.*, 182 F.3d 376, 377-78 (5th Cir. 1999) (stating that court must review "the entire record" in the light most favorable to the plaintiff to determine whether or not to grant judgment as a matter of law); *Snyder v. AG Trucking, Inc.*, 57 F.3d 484, 490 (6th Cir. 1995) (affirming grant of judgment as a matter of law after reviewing the evidence presented by both parties); *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999) (quoting *Anderson* for the proposition that judgment as a matter of law is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law"); *Steckstor v. Hancock*, 984 F.2d 274, 276 (8th Cir. 1993) (citing *Anderson* for the proposition that judgments as a matter of law are appropriate where the evidence "is so one-sided that one party must prevail as a matter of law"); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson* for the proposition that judgment as a matter of law is appropriate "where the evidence is so one-sided that one party must prevail as a matter of law"); *Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175, 1181 (10th Cir. 1995) (stating that "[j]udgment as a matter of law is appropriate only if the evidence . . . points but one way and is susceptible to no reasonable inferences supporting the nonmoving party"); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (quoting *Anderson* for the proposition that judgment as a matter of law is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law"); *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1269 (Fed. Cir. 1999) (noting that trial court, when presented with a motion for

evidence is reviewed and under what standard. In *Anderson*, this Court wrote:

> As the Court long ago said in *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:
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> > Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. (Footnotes omitted.)
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> See also *Pleasants v. Fant*, 22 Wall. 116, 120-121, 22 L.Ed. 780 (1875); *Coughran v. Bigelow*, 164 U.S. 301, 307, 17 S.Ct. 117, 119, 41 L.Ed. 442 (1896);

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judgment as a matter of law, must consider *all* of the evidence); *Barwick v. United States*, 923 F.2d 885, 889 (D.C. Cir. 1991) (noting that trial court, when presented with a motion for judgment as a matter of law, must consider *all* of the evidence *available*); *Atchison, Topeka and Santa Fe Ry. Co. v. Chevron U.S.A., Inc.*, 896 F.2d 561, 562 (Temp. Emer. Ct. of App. 1989) (citing *Anderson* for the proposition that judgment as a matter of law is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law").

Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 343, 53 S.Ct. 391, 394, 77 L.Ed. 819 (1933).

The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed.2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position

> will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Munson, supra,* 14 Wall., at 448.

Anderson, at 251-52. Clearly, a court cannot determine whether there is a genuine issue of material fact or whether the evidence is entirely one-sided without looking at the evidence as a whole.

III. THE REQUIREMENT THAT A COURT CONSIDER ALL THE EVIDENCE, NOT JUST THE EVIDENCE FAVORABLE TO THE NON-MOVING PARTY, APPLIES TO BOTH MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS FOR JUDGMENT AS A MATTER OF LAW.

As outlined in part II, *supra,* a court should consider all of the evidence when determining whether to grant summary judgment. This same evidentiary standard applies to both motions for summary judgment and motions for judgment as a matter of law. The requirement that such standards be applied throughout a case, i.e., at the summary judgment stage, throughout the trial itself, and at the time of a motion for judgment as a matter of law after the trial, was made clear by this Court in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).

Anderson was a libel suit in which the Court of Appeals had found that the evidentiary requirement of *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964), holding that a plaintiff claiming libel must show "clear-and-convincing-evidence" of actual malice, was not applicable at the summary judgment stage. *Anderson,* 477

U.S. at 244, 106 S. Ct. at 2508. This Court reversed that finding, concluding that "the determination of whether a given factual dispute requires submission to a jury **must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages.**" *Id.,* 477 U.S. at 255, 106 S.Ct. at 2514 (emphasis added); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The *Anderson* Court reasoned:

> [I]n ruling on a motion for summary judgment, the judge must view the evidence presented **through the prism of the substantive evidentiary burden.** This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff provided his case **by the quality and quantity of evidence required by the governing law or that he did not.** Whether a jury could reasonably find for either party, however, cannot be defined **except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant:** It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and **these standards and boundaries are in fact provided by the applicable evidentiary standards.**

Id., 477 U.S. at 254, 106 S. Ct. at 2513 (emphasis added). With this reasoning, the *Anderson* Court held that the Court of Appeals had not applied the correct standard in reviewing the District Court's grant of summary judgment and, thus, vacated that decision and remanded the case. *See id.,* 477 U.S. at 257, 106 S. Ct. at 2514-15.

This is consistent with the Federal Rules of Civil Procedure themselves. Rule 56 requires a granting of summary judgment where "there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." Fed. R. Civ. P. 56. The 1991 amendment of Fed. R. Civ. 50 abandoned the terminology "direction of verdict" to adopt the term "judgment as a matter of law" to "call[ ] attention to the relationship between the two rules." Fed. R. Civ. P. 50 advisory committee's notes. Additionally, the advisory committee noted that, wi[illegible]egard to motions made under Fed. R. Civ. P. 50:

> The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it **serves to link the two related provisions**.
>
> The revision authorizes the court to perform its duty to enter judgment as a matter of law **at any time during the trial**, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. . . .

Fed. R. Civ. P. 50 advisory committee's notes (emphasis added).

This is exactly what the Fifth Circuit did in the case at bar. The Fifth Circuit performed a plenary review, "considering all the evidence in a light most favorable to Reeves," and found that there was insufficient evidence presented of age discrimination. (Fifth Circuit Op. at 9-10.) Petitioner argues to this Court that the Fifth Circuit's consideration of all of the evidence contradicted *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-53 (1986). (Pet'r Br. at 39.) He asserts that:

> Contradictions between Plaintiff's evidence and Defendant's evidence on material points . . . created issues of material fact. Established summary judgment procedure requires the court to disregard movant's evidence which is contradicted by non-movant's evidence. Contradiction in evidence on material points precludes summary judgment under Rule 56. . . .

(Pet'r Br. at 40.) He then goes on to state that "[t]he contradictions in evidence on material points should have precluded a directed verdict under Rule 50 for the same reason they preclude summary judgment under Rule 56." *Id.*

This backwards logic is in direct contravention of the reasoning outlined in *Anderson v. Liberty Lobby*. There, this Court recognized that the "inquiry involved in a ruling on a motion for summary judgment or for a directed verdict **necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits**." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512 (emphasis added). It is not a mere contradiction in evidence or whether the evidence "unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented" which is the proper issue for the court to determine with either motion. *Id.*

This was the standard applied by the Fifth Circuit. *See* Fifth Circuit Op. at 5 (holding district court's judgment would be reversed where " 'there is no legally sufficient evidentiary basis for a reasonable jury to find' that Sanderson discharged Reeves because of his age"). In weighing the sufficient evidentiary basis for a verdict, the Fifth Circuit correctly applied the underlying substantive law as mandated by *Anderson* and outlined in *Hicks:* "plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." (Fifth Circuit Op. at 6).

Thus, it is clear that *Anderson* directs that, just as that plaintiff was required to meet the evidentiary standards for a libel claim at the summary judgment stage, the substantive law of *Hicks* must be applied throughout a

discrimination case: at the motion for summary judgment stage and when considering motions for judgment as a matter of law, whether made during or after trial. Plaintiff must be required to prove the substantive elements of his claim no matter what the timing of the dispositive motion. Employers who are faced with a claim for discrimination should not be required to go to a jury when the employee can evidence no illegal determinative influence on the employer's decisions. Adhering to *Anderson*, this Court should rule that the substantive evidentiary standards of *Hicks* must be applied at both the summary judgment and motion for judgment as a matter of law stages.

CONCLUSION

For the foregoing reasons, ARA respectfully requests that this Court affirm the Fifth Circuit's decision in favor of the Respondent.

Respectfully submitted,

JOHN J. COLEMAN, III*
*Counsel of Record
MARCEL L. DEBRUGE
THOMAS S. ROPER
YVONNE N. BESHANY
LAURA G. BLACK
BALCH & BINGHAM LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

Counsel for Amicus Curiae,
Alabama Retail Association

*Counsel of Record**

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IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

Of Counsel:

THOMAS J. WALSH, JR.
TIMOTHY S. BLAND
FORD & HARRISON, LLP
6750 Poplar Avenue
Suite 600
Post Office Box 171375
Memphis, TN 38187-1375
(901) 756-1550

JOHN E. DUVALL
FORD & HARRISON, LLP
121 West Forsyth Street
Suite 1000
Post Office Box 41566
Jacksonville, FL 32203
(904) 356-8073

PETER J. PETESCH
Counsel of Record
FORD & HARRISON, LLP
1920 N Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 463-6633

157720

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*

The Society for Human Resource Management ("SHRM"), the voice of human resource professionals for over 50 years, submits this brief in support of Respondent Sanderson Plumbing Products, Inc.[1] SHRM represents over 130,000 human resource professionals in the United States and in 80 other countries. SHRM leads, educates, and provides a forum for human resource professionals regarding matters of critical daily importance to managing employees in the workplace. Human resource professionals develop and administer structures to recruit, train, and manage employees in all types of work environments. SHRM and its members are deeply concerned with understanding and implementing all non-discrimination and equal opportunity laws and principles in the workplace. As this Court recognized last term in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), this prophylactic role in policing and preventing discrimination furthers the goals of Title VII, the Age Discrimination in Employment Act, and the Americans With Disabilities Act as much or more than litigation or damage awards. SHRM's members are typically the persons involved in implementing, administering and training on non-discrimination policies and in reviewing and implementing adverse employment decisions that are increasingly challenged in the courts.

---

1. *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the written consent of the parties. Evidence of said consent is filed concurrently with this brief. No person or entity other than *amicus curiae*, its members, or its counsel authored any portion of this brief or made any monetary contribution to the preparation or submission of this brief.

The issue before the Court — on the standard for granting judgment as a matter of law for employers in employment discrimination actions — is vital to SHRM because of its members' close involvement in preventing, resolving and defending employment discrimination litigation. Contrary to the implications of some of the briefs supporting the Petitioner, Petitioner and *amici* supporting Petitioner are not alone in contending that laws against discrimination are a vital part of our national fabric — but mistakes and misjudgments are not discrimination, and those cases, which involve everyday occurrences in imperfect workplaces, do not belong in front of juries. Petitioner and many *amici* supporting Petitioner urge an impractical position on where to draw the line in evaluating discrimination claims on a motion for judgment as a matter of law; they urge letting far more cases proceed to jury decisions even in the absence of actual evidence or inferences supporting unlawful discrimination. This position is untenable in light of the current realities of the workplace and developments in the practice of employment law.

SHRM members are faced with an unusual explosion of employment lawsuits, a curious development in an era of economic prosperity and labor shortage. A recent report by the United States Department of Justice confirms that between 1990 and 1998 employment discrimination cases brought in federal court have tripled.[2] Given this nation's

2. *See Civil Rights Complaints in U.S. District Courts, 1990-98,* Department of Justice Bureau of Justice Statistics (January 16, 2000). This does not reflect the many claims filed under parallel state anti-discrimination laws in state courts. Many state courts look to federal precedent in deciding these dases. In addition to litigated claims, according to figures recently released by the EEOC's Office of Research, Information and Planning, from 1992 through 1999 an average of 81,833 discrimination charges were filed each year. Daily Labor Report (BNA), January 31, 2000, at E1.

progress in combating bigotry, this exponential growth in employment claims cannot reflect a three-fold increase in discrimination or intolerance. Rather, it is an explosion of litigation. This historical reality compounds the impracticality and adverse impact of the position urged by Petitioner and his supporting *amici*.

SHRM appears in this action to stress the need for a standard faithful to both the Civil Rights laws and the need to combat workplace discrimination, as well as to advance the purpose of procedural rules relieving courts and employers from unnecessary trials. Such a standard would expeditiously dispose of cases which simply question the non-discriminatory judgment of management, or even the incomplete explanations sometimes offered to spare employees (and employers) from embarrassment. It would protect the legitimate — albeit sometimes imperfect but non-discriminatory — judgment calls made by management day to day. As a forum for excellence in the field of human resource management, SHRM does not defend the practice of offering false explanations for employment decisions, or making sloppy and incorrect decisions. It simply recognizes that both practices, while problematic in other respects, are not unlawful and should not subject SHRM members, or the organizations employing them, to protracted court proceedings.

SUMMARY OF ARGUMENT

Neither the "pretext-only" nor the pure "pretext-plus" approach to this Court's proof-scheme in employment discrimination cases provides a satisfactory rule for every case. No such rigid semantic formula can properly take into account the variety of circumstances that exist in the real world of the workplace. A more flexible middle ground is

needed. Such an approach would better serve to allow employers, agencies and courts to screen out frivolous cases, in keeping with the purposes of Fed. R. Civ. P. 50, 56, and other Rules of Civil Procedure, while also deterring and correcting true discrimination, thereby advancing the aims of the Civil Rights Acts.

A strict "pretext only" rule, for example, would improperly allow juries to second-guess employers' business judgments. Such a rule would also permit juries to consider cases in which an employer gives an employee a "wrong" reason for a disciplinary action simply to avoid personal embarrassment, even though the real reason (e.g., poor skills, abrasive temperament) is indisputably non-discriminatory. On the other hand, requiring plaintiffs to prove "pretext plus" in every case would overlook instances in which an employer giving a false reason for an action does so in circumstances evincing mendacity (as opposed to a mistake or faulty business judgment) on the part of the decision-maker, or an improper motive from which discriminatory animus may be reasonably inferred.

A proper "Whole Case Rule" would be stated thus: A plaintiff claiming employment discrimination can prove pretext sufficient to withstand judgment as a matter of law by showing that, taking into account the entire record, there is significantly probative evidence to allow a rational trier of fact to infer that the employer acted with discriminatory intent. Such a showing may be made by direct or circumstantial evidence, but the plaintiff cannot rely on mere speculation or conjecture as to the employer's motives, or on the plaintiff's own subjective opinion regarding the employer's business judgment. In some cases, as where the employee's *prima facie* case is strong, and employer

mendacity may reasonably be inferred, it may suffice for the plaintiff simply to demonstrate that the employer gave a deliberately false reason for its action. In other cases, as where evidence indicates innocent (non-discriminatory) motive, the plaintiff cannot escape judgment as a matter of law solely by showing that the employer gave the "wrong" reason for its action.

The question on summary judgment is whether the record, taken *as a whole* ("pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any"), shows "that there is no *genuine* issue as to any *material* fact" and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (emphasis added); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[3] This requires that federal district judges consider the entire factual context in which employment decisions are made, rather than artificially focusing on one particular word or fact in the record. Given their typical wealth of experience in law and life, federal trial judges are well equipped to perform this all-important gatekeeping function. Moreover, as a further objective check, appellate courts exercise *de novo* review of such decisions. *See* n.3.

---

3. As this Court has recognized, essentially the same standards apply to a judgment as a matter of law in jury trials under Rule 50, which authorizes the district court to remove a case from a jury where, after a party has been fully heard on an issue, "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1985). The appellate court reviews a decision on a Rule 50 motion under the same standard. *Flippin v. O'Dea*, Case No. 98-6303, 1999 U.S. App. LEXIS 34062 (6th Cir., December 16, 1999) at *2; *Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 336 (5th Cir. 1999); *Criado v. IBM Corp.*, 145 F.3d 437, 441 (1st Cir. 1998); *Cross v. Cleaver*, 142 F.3d 1059, 1066 (8th Cir. 1998).

Under this approach, no employee with a case substantial enough to go to a jury need worry about a premature disposition of his or her case. Nor should employers be concerned that a large number of frivolous cases will be tried. Moreover, in terms of compliance and deterrence (far more beneficial than after-the-fact compensation and punishment following expensive and time-consuming litigation of individual cases), employees and employers alike would enjoy the greater predictability that accompanies the application of common sense to workplace situations. On the one hand, no employee would be allowed to assume or speculate that membership in a protected class automatically immunizes one from disciplinary action for poor job performance or the ordinary travails of an imperfect workplace. An employee would not be able to rely solely on a simple mantra — "the employer lied" — to conclude that one sin proves all sins. On the other, no employer would be permitted to pursue discriminatory practices with impunity simply by inventing non-discriminatory reasons for an adverse employment action. An employer could not invoke its own mantra — "it was a business judgment" — to disguise true discrimination.

ARGUMENT

I. Neither Erroneous Business Judgment Nor False Excuses Designed to Avoid Embarrassment Are Pretexts for Discrimination Justifying Denial of Judgment as a Matter of Law.

Nearly every federal Circuit Court of Appeals has expressly upheld the long-standing notion that the courts should not act as "super-personnel departments," reexamining the prudence of employers' business judgments.[4] Indeed, as the First Circuit Court of Appeals stated two decades ago in an ADEA case:

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and non-discriminatory,

4. *See, e.g., Hidalgo. v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir. 1997); *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *DeJarnette v. Corning Incorporated*, 133 F.3d 293, 299 (4th Cir. 1998); *Scott v. University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998), *questioned on other grounds, Kimel v. Florida Bd. of Regents*, __ U.S. __, 120 S. Ct. 631 (2000); *Baron v. City of Highland Park*, 195 F.3d 333, 341 (7th Cir. 1999); *Regel v. K-Mart Corp.*, 190 F.3d 876, 880 (8th Cir. 1999); *Simms v. Oklahoma ex rel. Dept. of Mental Health & Substance Abuse Services*, 165 F.3d 1321, 1330 (10th Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 53 (1999); *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999); *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999). As these courts stress, the issue is not whether the employer's decisions is "right" or even rational, but only whether it is discriminatory.

> but does not have to be a reason that a judge or jurors would act on or approve. Nor is an employer required to adopt a policy that will maximize the number of minorities; women or older persons in his work force. An employer is entitled to make his own policy in business judgments and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.

Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.6 (1st Cir. 1979).

This "business judgment rule" is entirely in accord with this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993):

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines, according to proper procedures, that the employer has unlawfully discriminated.

Id. at 514.

The Court further emphasized the point:

> [N]othing in law would permit us to substitute for the required finding that an employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id. at 514-515.

Thus, the business judgment rule, combined with this Court's opinion in *Hicks*, clearly demonstrates that neither erroneous business judgment nor false excuses designed to avoid embarrassment are pretexts for discrimination justifying denial of judgment as a matter of law.

For example, suppose an employer is faced with the economic necessity of laying off three out of six accountants. Suppose also that in the exercise of its legitimate business judgment, the employer lays off the three that it genuinely believes are the least valuable to its organization. Further assume that one of the three laid off sues for race discrimination. Perhaps she can even prove unequivocally that the quality of accounting work in the employer's business dropped dramatically as a result of her discharge. Should the employer be required to face a jury on the ex-employee's discrimination claim simply because, in hindsight, its business judgment was incorrect? Certainly not. That is exactly the type situation for which the business judgment rule was adopted. The employer should not have to face a jury, often not attuned to the nuances of employment decisions, simply because the employer made a mistake that had no underlying discriminatory motive, or because the employer strayed (in a non-discriminatory manner) from "best practices" in human resources.

With respect to false excuses designed to avoid embarrassment, consider the following situation. Numerous employees complain to their employer that a particular new employee has an abrasive and offensive personal manner — or even offensive personal hygiene habits. The employees tell the employer they do not wish to work with that employee for that reason. The employer has also noticed the employee's problems and knows, too, that the employee is not a stellar

performer. The employer decides that the appropriate course of action to promote harmony and efficiency in the workplace is to discharge the employee. Understandably embarrassed to cite personal mannerisms as the reason for discharge, the employer chooses the immediate path of least resistance (out of laziness, convenience, or even fear of confrontation) and tells the employee that his position is being eliminated.

Clearly, although the employer has given the employee a false reason for his discharge, discrimination was not the real reason.[5] Pursuant to *Hicks*, a court should not substitute the finding that the employer's reason was false for the required finding that discrimination was the reason. Such a case should not be sent to the jury.

In the instant case Petitioner clearly questions the adequacy of Sanderson's business judgment (*see* Petitioner's brief at 10, 12, 28), and argues that judgment questions should go to a jury. *Amici* supporting Petitioner make similar arguments. They try to impose a *de facto* code of extra-careful treatment and scrutiny of employment decisions for everyone in a protected class. Yet virtually all applicants and employees adversely affected by an employment decision feel that they have been misjudged. Not all their claims should proceed to trial.

---

5. As the EEOC itself concedes, "The true nondiscriminatory motive need not be an illegal one. An employer might withhold its true motive not because it is unlawful but because it is embarrassing, such as nepotism or personal animosity, or in order to spare the employee's feelings." Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 22, n.5. This observation precisely illustrates the need for the kind of flexible rule SHRM proposes here.

II. This Court Can Adopt a Flexible Test Allowing Cases With Sufficient Evidence of Discrimination to Proceed to the Jury, While Culling Unsupported Claims.

Petitioner and many *amici* supporting Petitioner urge a rigid test in which every case casting doubt on the reliability of the employer's proffered reasons should proceed to trial. This test punishes the innocent, divests courts of their proper gatekeeping function, and diverts attention from meritorious cases involving actual discrimination. Judgment as a matter of law favoring the employer, as argued above, is appropriate in cases involving: (1) adherence to even erroneous business judgment; and (2) certain knowingly false or incomplete reasons underlying the employer's action — reasons provided to conceal or sugarcoat an embarrassing but not discriminatory real reason.

In each of these categories, there is no evidence of intentional discrimination. Anti-discrimination laws do "not make employers liable for doing stupid or even wicked things; it makes them liable for *discriminating*." *Norton v. Sam's Club*, 145 F.3d 114, 119-20 (2d Cir.), *cert. denied*, 525 U.S. 1001 (1998) (emphasis in original). Further, as this Court emphasized in *Hicks*, even lying under oath does not constitute proof of a discriminatory motive: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." *Hicks*, 509 U.S. at 521.

On the other hand, in some cases, this Court has held that evidence justifying disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination and allow a case to proceed to a jury.

See Hicks at 511. Following *Hicks*, this Court can now illuminate a reasoned middle ground averting trials for claims with insufficient evidence of discrimination, while drawing appropriate inferences from unexplained mendacity *or* other evidence indicating discriminatory animus by the decision-makers and allowing those cases to proceed to trial.

Employers' unexplained or palpable mendacity, in contrast with a simply mistaken reason or exercise of faulty business judgment, may, as *amicus* Equal Employment Opportunity Commission suggests, permit an inference of a wrongful motive. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 18-19. *See also Aka v. Washington Hospital Center*, 156 F.3d 1284, 1298 (D.C. Cir. 1998). On the other hand, a pure "pretext only" approach to denying judgment as a matter of law, as urged by Petitioner and his supporting *amici*, reflects neither the spirit of *Hicks* nor the realities of the imperfect workplace.

The District of Columbia Circuit staked out an appropriate middle ground interpretation of *Hicks* in its *en banc* consideration of *Aka v. Washington Hospital Center*, *supra*. *Aka* rejected the "pretext-only" (even non-discriminatory pretext) rule urged by Petitioner and several *amici* in support of Petitioner, but also did not embrace a stringent test requiring discrimination plaintiffs in every case to come forward with the often elusive direct evidence of discrimination. The majority opinion in *Aka* even shied away from using the term "pretext" at all, explaining:

> The term "pretext" can be slippery; sometimes it means that an employer's explanation is incorrect, and sometimes it means both that the explanation is incorrect and that the employer's real reason was discriminatory. . . . We will avoid using the term "pretext," and instead refer (as appropriate) to evidence that the employer's explanation is false, that it is a lie, or that the employer's real motivation was discriminatory.

Id. at 1288, n.3.

Aka holds the plaintiff to the burden of showing, as *Hicks* requires, that the employer's reason is false and that the real motivation was discrimination. That court acknowledged that "there are at least some situations in which genuine issues of material fact as to the falsity of the employer's explanation will not suffice alone to avoid summary judgment." *Aka*, 156 F.3d at 1290. Examples of this principle, the court explained, include falsehoods made (with no evidence suggesting otherwise) to conceal other embarrassing reasons[6] and instances of weak showings of pretext combined with a weak *prima facie* case. *Id.* at 1291. Yet, *Aka* also holds that a plaintiff *can* escape judgment as a matter of law by combining plain pretext with

6. An "innocent" excuse for a false explanation should not always guarantee judgment as a matter of law for an employer, but when there is no evidence to refute the sincerity or innocence of the excuse, summary judgment is appropriate. *See Aka*, 156 F.3d at 1291; *but see Aka*, 156 F.3d at 1294, n.8. A plaintiff's mere conclusions, suspicions or speculation on discriminatory motives clearly will not suffice to withstand summary judgment in this or any other instance. *See, e.g., Murphy v. ITT Educational Services, Inc.*, 176 F.3d 934, 938 (7th Cir. 1999); *Doan v. Seagate Technology, Inc.*, 82 F.3d 974, 977 (10th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1318 (4th Cir. 1993); *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1417-1418 (10th Cir. 1993); *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

the overall strength of the plaintiff's *prima facie* case *or* other evidence probative of discrimination by the decision-maker. The court explained that:

> the focus [for judgment as a matter of law] will be on whether the jury could infer discrimination from the combination of (1) the plaintiff's *prima facie* case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer) or any contrary evidence that may be available to the employer (such as evidence of a strong track record in equal opportunity employment).

Id. at 1289.[7]

In this regard, the *Aka* court advocates considering the case as a whole. *Id.* at 1290, 1291.[8] Although the plaintiff's

7. *See also Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996) ("the second part of this [*Hicks*] test sometimes may be satisfied without additional evidence where the overall strength of the *prima facie* case and the evidence of pretext suffice[s] to show intentional discrimination").

8. *See also* R. Acosta, R. and E. Von Vorys, *Bursting Bubbles and Burdens of Proof: Disagreements on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 Tex. Rev. Law & Pol. 207 (Spring 1998); Alice Marie Pettigrew, *Aka v. Washington Hospital Center: The District of Columbia Circuit Seeks Middle Ground in the Pretext-Only/Pretext Plus Debate*, 29 University of Memphis Law Review 863 (Spring/ Summer 1999).

true "discrediting of an employer's stated reason for its employment decision is entitled to considerable weight,"[9] it also "is not enough to disbelieve the employer." *Id.* For example, "there may be no legitimate jury question as to discrimination in a case in which a plaintiff has created only a weak issue of material fact as to whether the employer's explanation is untrue, and there is abundant independent evidence in the record that no discrimination has occurred." *Id.*

Perhaps the best example of this instance is the "business judgment" scenario discussed, *supra*. Even if one could disagree with the employer's assessment of matters such as qualifications, job performance, or appropriate behavior, the "judgment call" should not form the basis for a "discrediting of the employer's reasons" sufficient to escape summary judgment in favor of the employer. *Id.* at 1294. This reasoning also prevents plaintiffs from relying on their own self-serving self-assessments in order to evade summary judgment. *See DeJarnette v. Corning Incorporated*, 133 F.3d 293, 299 (4th Cir. 1998) (" 'it is the perception of the decision maker which is relevant,' not the self-assessment of the plaintiff"); *citing Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996).

Similarly, "[a]n employer's reliance on the disputed subjective assessments [*i.e.*, attitude or enthusiasm] will not create a jury issue in every employment discrimination case." *Aka*, 156 F.3d at 1298. To keep this "business judgment" defense "honest," however, the *Aka* court added a more objective component:

9. This is particularly true, the court in *Aka* explained, when the employer's explanation is "not only a mistaken one in terms of the facts, but a lie . . ." *Id.* at 1293.

> If a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate — something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

Id. at 1294.

This approach works only if courts resist second-guessing management decisions or entering the role of a "super-personnel department," discussed *supra*. It protects reasoned, yet incorrect or assailable "business judgment," but prevents defendants from forever hiding under the cloak of business judgment when it is obvious that no reasonable person could have arrived at the same "judgment."

The other extreme is the instance in which "the employer's explanation is not only a mistaken one in terms of the facts, but a lie. . . ." *Id.* at 1293. In this instance, "[t]he jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent." *Id.* (citations omitted). Even a lie, however, does not automatically entitle the *plaintiff* to judgment as a matter of law. *Id.*

The moderate approach in *Aka*, if kept from extending to either a rigid "pretext only" rule or a strict "pretext plus" rule always requiring additional and direct evidence of discrimination, will spare the federal courts and employers from trying claims with insufficient evidence of

discrimination, while also protecting those whom Congress intended to protect under both the Civil Rights Laws and the Federal Rules of Civil Procedure.

III. Judgment as a Matter of Law is a Vital Tool to Protect the Interests of Courts and All Parties to Discrimination Lawsuits.

Since this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), it has been clear that the trial judge plays the vital role of a gatekeeper in jury trials.

> . . . [B]efore evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed.

Id. at 250-51 (citations omitted) (emphasis in original).

This appeal presents the Court with an opportunity to provide further instruction to the trial court on its role as a gatekeeper in employment discrimination litigation. Such instruction is clearly appropriate given the divergence in understanding of this Court's earlier discussion of this role in *Hicks, supra,* and the growing questions over the continued vitality (and utility) of the *McDonnell Douglas/Burdine* framework in employment discrimination cases.[10]

10. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In light of the Court's decision in *Hicks, supra,* many commentators contend that the McDonnell Douglas/Burdine equation has served its purpose. *See, e.g.*, Henry L. Chambers, *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 Alb. L. Rev. 1 (1996); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995).

As documented above, there has been an explosion in employment discrimination litigation. To some measure, that explosion must be attributed to the recent availability of jury trials in such litigation.[11] Yet, individuals' rights to a jury trial are not rigidly dictated.[12] Courts have long recognized the need for jury control devices.[13] Employment discrimination litigation presents significantly unique challenges to jurors because of natural human empathy for individuals affected by adverse employment actions, whether or not those actions are motivated by unlawful discrimination. Discrimination is not the cause of all unjustified actions against members of protected classes (into at least one of which categories the majority of Americans fit, even excluding reverse discrimination claims). Mistakes and misjudgments are not unlawful discrimination. Those cases, involving everyday occurrences in imperfect workplaces do not belong in front of juries. Human issues, as well as the life experiences of the jurors, may often unwittingly transform employment discrimination litigation

11. Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, codified at 42 U.S.C. § 1981a(c), amended the Civil Rights Act of 1964 to allow jury trials in Title VII litigation if the plaintiff seeks damages.

12. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 289 (1966) (arguing that the Seventh Amendment did not codify "a rigid form of jury practice" in civil cases).

13. "There are a number of procedural devices used to restrict the power of the civil jury, which this Court has approved. Among these procedural devices are summary judgment, the directed verdict, special questions to the jury, and judgment notwithstanding the verdict." Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 483-84 (1996).

into "just cause" litigation if trial courts do not appropriately moderate such cases.[14] *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (recognizing trial court's gatekeeper role also in deciding whether expert scientific evidence is sufficiently trustworthy to submit to a jury).

The complexity of the federal anti-discrimination laws further complicates the jury's work. Federal Rules of Civil Procedure 50 and 56 provide the trial court with several means to keep employment discrimination case from the jury when appropriate. Petitioner and many *amici* supporting Petitioner urge an impractical position on where to draw the line in evaluating discrimination claims on motions for summary judgment and for judgment as a matter of law. They urge letting legions of cases proceed to jury decisions even in the absence of actual evidence or of reasonable inferences supporting unlawful discrimination. This position is untenable in light of the current realities of the workplace and developments in the practice of employment law.

There can be no denying that adversely affected employees often truly believe that they have been the victims of unlawful discrimination or some unidentified "injustice." Those beliefs standing alone, however, do not always present jury questions. In order to proceed, the non-moving party must also show more than the existence of a "metaphysical doubt" regarding the material facts. *Matshushita Electric*

14. "Because of this trend toward more complex and obscurely-written jury instructions, the jury is unable to exercise its role in applying the law to the facts in the case, because it is unable to understand the legal principles that it is charged with applying." Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 387 (1996).

Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). *See also Anderson, supra*, 477 U.S. at 249-50.

In the appropriate case, the trial court may control the jury through the directed verdict provided for in Federal Rule of Civil Procedure 50. This Court long ago upheld the constitutionality of the directed verdict in the context of civil jury trials as not unconstitutionally abridging the fact-finding power of juries.[15] Rule 50(b) authorizes a "judgment as to a matter of law," made by the judge after the jury has returned its verdict. Again, this Court long ago approved the constitutionality of this device.[16]

Under the same standard, in the appropriate case, the trial court may control the case through summary judgment

15. *Galloway v. United States*, 319 U.S. 372, 395-96 (1943); *see also Hepner v. United States*, 213 U.S. 103, 115 (1909) (noting that the right to civil jury trial under the Seventh Amendment is "subject to the condition fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law"); *Commissioners of Marion County v. Clark*, 94 U.S. 278, 284 (1877) (a judge is allowed to question, before evidence is left to the jury, whether there is any evidence "upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed"); *Parks v. Ross*, 52 U.S (11 How.) 362, 373 (1850) ("a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it").

16. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 660 (1935) (the practice of taking jury verdicts subject to a ruling on questions of law "was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury").

provided for in Federal Rule of Civil Procedure 56. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact that that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The same evidentiary standard applies to Rule 50 and Rule 56 analyses. *Anderson, supra*, 477 U.S. at 250-52.

Not every *prima facie* employment case presents a jury question. At every stage of the litigation, the trial court must keep in play evidentiary standards that determine whether the matter should as a matter of law proceed to the next stage. ". . . [T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages." *Anderson, supra*, 477 U.S. at 255. At every stage, therefore, the trial court must determine whether or not there is sufficient evidence as a matter of law to support a finding of unlawful discrimination.

> We are not, however, entitled to give a party the benefit of unreasonable inferences, or those at war with the undisputed facts. A mere scintilla of evidence is inadequate to support a verdict, and a judgment as a matter of law is proper when the record contains no proof beyond speculation to support the verdict.

Larson v. Miller, 76 F.3d 1446, 1452 (8th Cir. 1996) (en banc) (citations and quotation marks omitted).

Legal realists have noted that distinction between issues of fact and issues of law is a tenuous one at best.[17] In reality, the trial court is in the best position to apply the distinction between law and fact in the context of an employment discrimination case over which it has presided. Rule 50, as amended, recognizes this.[18] Rule 56, as explained by this Court in *Anderson*, recognizes this as well.

Petitioner and *amici* supporting Petitioner argue that the court "substituted its view of the weight of the evidence for the jury's reasonable view." Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 24; Petitioner's Brief at 19. Judgment as a matter of law is not appropriate if "reasonable minds could differ as to the import of the evidence." *Anderson, supra,* 477 U.S. at 250. This is simply not what the court did in this case, however. The court correctly considered whether or not the evidence was sufficient to meet the quantum of proof required in this case. As Justice Brennan observed in *Anderson, supra,* under the majority's

17. Bruce E. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* 73 (1987) ("The hoary distinction between fact and law is, at bottom, artificial, although often invoked."); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1181 (1989) (arguing that reasonable care is a question of fact when "legal rules have been exhausted and have yielded no answer"); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 Yale L. J. 667, 668 n.4 (1949).

18. Under Rule 50, the standard for granting a motion for judgment as a matter of law is the same whether the trial court addresses the motion before or after the case is submitted to a jury. *See* subdivision a under Advisory Committee Notes, 1991 amendment. *See also Larson v. Miller*, 76 F.3d 1446, 1452 n.3 (8th Cir. 1996) (en banc).

holding, this is what judges must do. The judge must bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum". 477 U.S. at 266-67, Brennan, J. dissenting. This is entirely different from weighing the evidence. It is instead determining whether or not there is sufficient evidence to allow the jury to weigh, considering the case as a whole. The role of the trial court in employment discrimination litigation is not to permit speculation, surmise and conjecture to create a jury issue. Rules 50 and 56 provide the trial court with the proper means to accomplish this.

Petitioner's *amici* essentially acknowledge that much of employment discrimination litigation is a fishing expedition:

> In most employment discrimination cases, the plaintiffs cannot file suit already in possession of the facts with which they can prove the merit of their claims. Usually, only the employer knows the true basis for its actions. Because of the press of numerous charges of discrimination and inadequate funding, the investigation of such charges by government agencies is often superficial, leaving the charging party with few additional facts. In addition, pre-complaint investigations by counsel are often necessarily incomplete, because State ethics rules frequently bar plaintiffs' counsel from interviewing the decisionmakers. Thus, plaintiffs are ordinarily dependent on discovery to learn the defendant's reasons for the challenged action, to discover whether there are reasonably comparable employees of a different race or gender or age who were treated more favorably, to determine

> whether there are factors that affect their comparability or explain the differences in treatment, to explore the basis of each nondiscriminatory reason the defendant will proffer, and to look for evidence to rebut those reasons.

Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law, *et al.* at pages 24-25 (footnote omitted).

This argument presumes that if permitted to look long enough, any plaintiff (or her counsel) will eventually find some evidence somewhere to support an argument to the jury that the employer's proffered reason for an adverse employment action was either obtuse or incorrect. This view of this evidence would thereupon confirm the plaintiff's subjective belief held at the commencement of the litigation that she was, indeed, the victim of unlawful discrimination. At the end of the day, however, that evidence may not be sufficient to present a real jury question. The true candor of the argument of *amici* is that subjective beliefs are what propel much of the anti-discrimination litigation; the subjective belief that somewhere out there is some evidence that will cast doubt on the employer's proffered reason thereby after the fact justifying the litigation.

"In law, as elsewhere, actions and evidence acquire their meaning from experience and context." Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279, 305 (November, 1997). Trial courts must moderate the experiences and contexts of the opposing parties in order for consistently applied rules to emerge in employment discrimination litigation. Unfortunately, at times sloppy and incorrect decisions occur

in the employment context. Employers offer false explanations for employment decisions for any number of lawful reasons. *See* Section I, *supra*. While such actions may be problematic from a human resource management viewpoint and even poor business practices, they do not violate federal law. SHRM members, and the organizations employing them, should not be subjected to protracted court proceedings as a result of lapses in business judgment. Lapses in business judgment do not, per se, create jury questions.

CONCLUSION

The Court should resolve the inconsistencies in the courts below and the unworkable solution urged by Petitioner and his supporting *amici* by articulating a clear, simple "Whole Case Rule." This case provides an excellent example of a situation where, applying such a rule, the Fifth Circuit's judgment as a matter of law for the employer should be affirmed. This principled, common-sense approach will spare federal courts and employers from trying claims supported by no evidence of discrimination, advancing the aims of the Federal Rules of Civil Procedure while also protecting those whom Congress intended to protect under the Civil Rights Laws.

Respectfully submitted,

Of Counsel:

THOMAS J. WALSH, JR.
TIMOTHY S. BLAND
FORD & HARRISON, LLP
6750 Poplar Avenue
Suite 600
Post Office Box 171375
Memphis, TN 38187-1375
(901) 756-1550

JOHN E. DUVALL
FORD & HARRISON, LLP
121 West Forsyth Street
Suite 1000
Post Office Box 41566
Jacksonville, FL 32203
(904) 356-8073

PETER J. PETESCH
Counsel of Record
FORD & HARRISON, LLP
1920 N Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 463-6633

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IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE TEXAS ASSOCIATION OF BUSINESS AND CHAMBERS OF COMMERCE IN SUPPORT OF THE RESPONDENT

DEAN J. SCHANER
Counsel of Record
SCOTT M. NELSON
HAYNES AND BOONE, L.L.P.
Attorneys for Amicus Curiae Texas Association of Business and Chambers of Commerce
1000 Louisiana, Suite 4300
Houston, Texas 77002
(713) 547-2000

157741

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Whether a discrimination plaintiff is entitled to a jury trial or can sustain an age discrimination finding under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (West 1999), when he fails to present sufficient evidence both that the employer's stated reasons for its adverse employment action were false and that age discrimination was the real reason.

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INTEREST OF AMICUS CURIAE[1]

The Texas Association of Business and Chambers of Commerce ("TABCC") is a non-profit corporation that represents employers throughout the State of Texas. It is the largest employer representative in Texas, with a membership that includes more than 6,000 business and 10,000 individual members, and 300 chambers of commerce. TABCC is interested in the outcome in this case because the Petitioner, Roger Reeves ("Reeves"), is asking the Court to adopt a position that would have a grave and unfair effect on employers, like Respondent, Sanderson Plumbing Products, Inc. ("Sanderson"). The pretext for discrimination issue presented here is of paramount importance to employers. In employment discrimination cases, employers in the Fifth Circuit, like TABCC's members, have been subject to the fair, logical, and reasonable requirement that discrimination plaintiffs present sufficient evidence of discrimination before a jury may decide whether the employer is guilty of intentional discrimination. This requirement serves as a sensible filter to block baseless cases and to prevent unfair jury speculation where no evidence of discrimination exists. TABCC and its members have a compelling interest to preserve the Fifth Circuit's fair, logical, and reasonable approach to a discrimination plaintiff's evidentiary burden in employment discrimination cases.

SUMMARY

The Fifth Circuit properly applied the pretext for discrimination analysis articulated and refined in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), concluding that Reeves failed to produce sufficient evidence *both* that Sanderson's performance-related reasons for Reeves' discharge

1. Based on Supreme Court Rule 37.6, *amicus* states that no counsel for a party to this action authored any portion of this brief *amicus curiae* and that no person or entity, other than the law firm representing *amicus*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief *amicus curiae* has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.3(a).

were false *and* that age discrimination was the real reason. This Court should affirm the Fifth Circuit's decision — the pretext for discrimination analysis is consistent with the ADEA's statutory language, the well-established business judgment rule, and the plaintiff's ultimate burden to prove intentional discrimination in an ADEA case.

In stark contrast, Reeves and his Amici rely on an unprincipled, pretext-only test that hinges on an ideological assumption not warranted by the ADEA or Congress — the unsupported assumption that an employer always makes rational business judgments and, therefore, if it does not, the employer's real reason must have been discriminatory. This illogical leap eviscerates the Court's requirement that a discrimination plaintiff present *some* evidence of discrimination to support a discrimination finding, and improperly converts the ADEA into a "just cause" dismissal statute. Further, unbridled by the rational requirement that an employee present some evidence to support a discrimination finding, courts and juries would be allowed to speculate unfairly about employer business decisions, effectively sitting as "super-personnel departments" that would review and second-guess employer business judgments. Certainly Congress did not intend this result in enacting the ADEA.

Moreover, in this ADEA-wrongful discharge case, Reeves and his Amici contend that the minimal prima facie case (a younger individual replaced Reeves), together with his evidence rebutting the employer's explanation for his discharge, constitute sufficient evidence of age discrimination. This argument (i) ignores the Court's unmistakable pronouncement in *Hicks,* namely, that a plaintiff must produce sufficient evidence both that the employer's stated reasons were false and that discrimination was the real reason; (ii) overstates the minimal role of the prima facie case; and (iii) overlooks the plaintiff's ultimate burden to produce sufficient evidence of age discrimination.

Applying the *Hicks* pretext for discrimination analysis, the Fifth Circuit properly concluded that Reeves failed to offer

sufficient evidence that his age was a determining factor in Sanderson's decision to terminate his employment. Reeves challenges and disagrees with the performance-based reasons for his discharge, but those challenges, coupled with his self-assessment of his work performance, do not constitute sufficient evidence to sustain the jury's age discrimination finding. Likewise, Reeves places false hope in two alleged stray remarks a non-decisionmaker supposedly made; these, too, are insufficient to sustain an age discrimination finding.

ARGUMENT

This case presents the pivotal question whether a discrimination plaintiff can avoid judgment as a matter of law or summary judgment in an ADEA case by relying on (i) a skeletal prima facie case criterion (a younger individual replaced Reeves) and (ii) some evidence revealing that Reeves challenged Sanderson's performance-based reasons for discharging him. The Fifth Circuit correctly answered "no," and this court should affirm that judgment.

I. *HICKS* AND *HAZEN PAPER* COMPEL THE CONCLUSION THAT THE FIFTH CIRCUIT PROPERLY APPLIED A PRETEXT FOR DISCRIMINATION ANALYSIS TO REEVES' BASELESS CLAIM.

Reeves and his Amici contend that the Fifth Circuit erred because, under *Hicks*, he need only establish a prima facie case, together with evidence discrediting the employer's reasons for his discharge, to sustain the jury's age discrimination finding. (Pet. Br. 18-32; EEOC Br. 8-30).[2] Ignoring his ultimate burden of proof in a discrimination case, Reeves misinterprets *Hicks* and overstates the force of the prima facie case.

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2. This Brief uses the following abbreviations: Petitioner's brief — "Pet. Br."; Respondent's brief — "Res. Br."; EEOC's *amicus* brief — "EEOC Br."; and AARP's *amicus* brief — "AARP Br."

A. The Proof Burdens in Employment Discrimination Cases.

In *Hicks*, this Court refined and clarified the shifting burdens of proof in a discrimination case:

- A discrimination plaintiff, like Reeves, has the burden to prove a prima facie case of discrimination. When, as here, the ADEA case involves a discharge claim, the prima facie burden is a minimal one. Reeves must establish that he was (i) within the protected age group (over 40), (ii) qualified for his position, (iii) discharged from employment, and (iv) replaced by someone younger or otherwise discharged because of his age.[3]
- If Reeves succeeds in proving a prima facie case, then Sanderson must *articulate* some legitimate, nondiscriminatory reason for discharging Reeves.
- Once Sanderson articulates a nondiscriminatory reason for the discharge, then the presumption raised by the prima facie case disappears and Reeves must prove *both* that the nondiscriminatory reason *was false, and that discrimination was the real reason.*

Hicks, 509 U.S. at 506-11 & n.3 (emphasis supplied); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

Under this scheme, Sanderson's burden to rebut the prima facie case is slight. Sanderson need only produce some evidence that it discharged Reeves for a nondiscriminatory reason. *See, e.g., Hicks*, 509 U.S. at 506-07; *Burdine*, 450 U.S. at 254. Sanderson "need not persuade the court that it was actually motivated by [its] proffered reasons," *Burdine*, 450 U.S. at 254-55, nor must it prove the "absence of a discriminatory motive." *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978). After Sanderson articulates its nondiscriminatory reasons for discharging Reeves, any prima facie presumption "simply drops out of the picture," and Reeves' ultimate burden to produce sufficient evidence of discriminatory treatment remains with him at all times and never shifts to Sanderson. *Hicks*, 509 U.S. at 511. The parties and Amici do not disagree on these fundamental propositions; they part ways on the meaning and interpretation of *Hicks* as applied to a motion for judgment as a matter of law under Federal Rule 50.[4]

3. This Court and the lower federal courts have concluded repeatedly that a discrimination plaintiff's prima facie burden is "de minimis," "minimal," or "not onerous." *See, e.g., Hicks*, 509 U.S. at 506 (describing requirements of *McDonnell Douglas* prima facie case as "minimal"); *Burdine*, 450 U.S. at 253 (describing burden of establishing prima facie case as "not onerous"); *Fisher v. Vassar College*, 114 F.3d 1332, 1340-41 n.7 (2d Cir. 1997) (en banc) (recognizing that over one hundred federal appellate court opinions have characterized the prima facie case as "minimal," "de minimis," or "not onerous."); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996), *cert. denied*, 522 U.S. 1075 (1998) (noting that " '[t]o establish a prima facie case, a plaintiff need only make a very minimal showing.' ").

Additionally, this Court has assumed, without deciding, that the *McDonnell Douglas* burden-shifting scheme is equally applicable to ADEA cases. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993). The lower federal courts and the parties before this Court agree that the burden-shifting scheme applied in Title VII of the 1964 Civil Rights Act cases also applies in ADEA cases. *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 699 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 44 (1999) (recognizing that the *McDonnell Douglas* burden-shifting regime applies to ADEA cases); *DeLoach v. Infinity Broad.*, 164 F.3d 398, 400-01 (7th Cir. 1999) (same); *Simpson v. Kay Jewelers*, 142 F.3d 639, 643 (3d Cir. 1998) (same).

4. Consistent with *Hicks*, Amicus TABCC requests that this Court adopt the Fifth Circuit's "pretext for discrimination" analysis in both the summary judgment and judgment as a matter of law contexts. Under this analysis, courts require a discrimination plaintiff to produce sufficient evidence both that the employer's proffered reason was false and that discrimination was the real reason before the plaintiff will survive judgment as a matter of law. *See, e.g., Lawrence v. University*

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of Tex. Med. Branch at Galveston, 163 F.3d 309, 312 (5th Cir. 1999) (concluding that "[t]o avoid summary judgment, 'the evidence taken as a whole must create (1) a fact issue regarding whether each of the employer's stated reasons was what actually motivated it and (2) a reasonable inference that [discrimination] . . . was a determinative factor in the [employer's] actions' "); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 22 n.5 (1st Cir. 1999) (recognizing that "[i]n *Hicks*, the Court made it clear that a Title VII plaintiff must present sufficient evidence not only that the employer's proffered reason is false but also that the real reason is discrimination."); *Vaughan v. MetraHealth Cos., Inc.*, 145 F.3d 197, 199 (4th Cir. 1998) (holding that "[e]ven where an employer's explanation for taking action is disputed or disproved, a discrimination plaintiff must come forward with sufficient evidence that she was the victim of illegal discrimination before her case can go to the jury.").

In contrast, other circuits only require the plaintiff to produce evidence that the employer's reason is false. As explained in this brief, Reeves and his Amici advocate this seriously flawed, pretext-only test. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (noting that a plaintiff may survive judgment as a matter of law by producing evidence that raises a fact issue as to whether the employer's reasons are false); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 342-47 (6th Cir. 1997) (holding that "once a plaintiff has disproved the reasons offered by the defendant, the factfinder is permitted to infer discrimination."); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1046 (7th Cir. 1999) (observing that " 'once the employee has cast doubt on the employer's proffered reasons for the termination, the issue of whether the employer discriminated against the plaintiff is to be determined by the jury — not the court.' "); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1994) (recognizing that "[i]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate"); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) (determining that a plaintiff with a prima facie case and evidence of pretext can withstand a summary judgment motion); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998) (ascertaining that "a plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons").

(Cont'd)

B. The *Hicks* Pretext for Discrimination Analysis Requires a Plaintiff to Produce Sufficient Circumstantial Evidence of Both Falsity and Discrimination.

The holding in *Hicks* is abundantly clear — discrimination plaintiffs are not entitled to judgment as a matter of law if they prove that an employer's articulated reason for an employment practice is untrue. *Id.* at 507. Moreover, the *Hicks* court defined a plaintiff's "pretext for discrimination" burden in unmistakable terms: once the employer has *articulated* a nondiscriminatory reason for its adverse employment action, the plaintiff must prove *both* that the nondiscriminatory reason was false, *and* that discrimination was the real reason. *Hicks*, 509 U.S. at 511 n.4, 515; *see also id.* at 519 ("it is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.") (emphasis in original). Thus, applying the *Hicks* "pretext for discrimination" definition in the summary judgment or judgment as a matter of

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The remaining circuits apply a hybrid test, concluding that the prima facie case, combined with the falsity of the employer's stated reasons, *may or may not* defeat summary judgment. *See, e.g., Fisher*, 114 F.3d at 1333 (opining that "evidence constituting a prima facie case prior to the employer's proffer of a reason, coupled with the error or falsity of the employer's proffered reason may — or may not — be sufficient to show illegal discrimination"); *Ryther v. KARE 11*, 108 F.3d 832, 837 (8th Cir. 1997), *cert. denied*, 521 U.S. 1119 (1997) (reasoning "that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination."); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (reasoning that evidence of pretext is not always enough, but rather, "the court must consider all the evidence in its full context in deciding whether the plaintiff has met his burden of showing that a reasonable jury could conclude that he had suffered discrimination and accordingly summary judgment is inappropriate."). As a practical matter, this "hybrid" approach is not significantly different from the Fifth Circuit's "pretext for discrimination" analysis.

law context, Reeves must produce sufficient evidence to raise a triable issue that (i) Sanderson's articulated reasons for Reeves' discharge are false; *and* (ii) age discrimination was the real reason or a determining factor in Sanderson's decision. *Id.* at 511 n.4, 515.

Ignoring these principles, Reeves and his Amici assert that, together with his minimal prima facie case (younger individuals replaced him), he need only cast doubt on the credibility of Sanderson's stated reasons for his discharge to sustain the jury's age discrimination finding. (Pet. Br. 18-32; EEOC Br. 8-30). Otherwise, Reeves complains, the Fifth Circuit improperly requires discrimination plaintiffs to present "direct evidence" of discriminatory treatment, a requirement that conflicts with this Court's decision in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3. (1983) (stating that a plaintiff is not limited to using "direct" evidence to prove a discrimination case). (Pet. Br. 21, 25-26, 32).

This "direct evidence" rhetoric, however, stems from a misreading of *Hicks*. Reeves' "pretext-only" argument focuses on an isolated passage that is dictum to the actual decision in *Hicks*, and the inference Reeves and his Amici manufacture and draw from the passage distorts this Court's actual holding. (Pet. Br. 24; AARP Br. 5-6). That passage reads:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*."

Hicks, 509 U.S. at 511 (emphasis in original).

This lone passage offers no hope for Reeves' age discrimination claim. First, the passage is dictum because it

does not bear directly on the precise issue then before the Court: whether a plaintiff automatically wins by proving the falsity of an employer's asserted reasons for its actions. Second, Reeves and his Amici's pretext-only interpretation of the passage is taken out of context. The passage does not support Reeves' strained conclusion that a genuine issue for trial exists under the ADEA whenever the plaintiff establishes a prima facie case and counters the employer's stated reason for discharge. When read together with the remainder of the opinion, the quoted passage merely states that, in limited cases in which the employer's stated reasons are obviously contrived, not simply incorrect or unwise, a plaintiff's evidence of pretext *may* combine with his prima facie case to *permit* the factfinder to infer intentional discrimination. While this may be enough to support a pro-plaintiff judgment, there must necessarily be a *finding of discrimination*. *See Hicks*, 509 U.S. at 511 n.4.[5]

By focusing almost exclusively on this one passage from *Hicks*, Reeves and his Amici overlook a significant, coordinate passage from the decision — a passage which effectively blunts the argument that discrediting the employer's stated reasons automatically sustains a discrimination finding:

> [T]here is nothing whatever inconsistent between this statement [that rejection of a defendant's reasons permits the inference of discrimination] and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *dis*believe the employer," *infra*, at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to

5. Contrary to Reeves' misguided pretext-only analysis, the "mendacity" parenthetical in the *Hicks* passage supports the conclusion that the prima facie case, coupled with some evidence of pretext, does not automatically sustain a discrimination finding. The "particularity" and "mendacity" language in the parenthetical is rendered meaningless and superfluous if *any* evidence of "falsity" is sufficient to support a discrimination finding.

sustain a finding of discrimination, *there must be a finding of discrimination.*

509 U.S. at 511 n.4 (emphasis in original).

Further, the *Hicks* majority repudiated the validity of dicta in *Burdine,* which implied that a plaintiff could prove discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence." 509 U.S. at 514 (citing *Burdine*, 450 U.S. at 256). Referencing numerous inconsistencies between the "unworthy of evidence" statement and other Supreme Court pronouncements in *Burdine* and elsewhere, this Court concluded "that the dictum at issue here must be regarded as an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent." *Id.* at 518. This Court explained that the law does not permit a court to substitute for the required discrimination finding the much different and lesser finding that the employer's explanation for its action was false. *Id.* at 513. Thus, Reeves could have bolstered any proffered evidence of age discrimination by demonstrating that Sanderson's reasons were "unworthy of credence" but, at the end of the day, he was required to produce some circumstantial proof of discrimination. *See id.* at 511 n.4. As the Fifth Circuit properly determined, Reeves came up short.

Similarly, in *Hazen Paper Co.*, 507 U.S. at 610, this Court reasoned that "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait *actually played* a role in that process and had a *determinative influence* on the outcome." (emphasis added). This Court also recognized that inferring age discrimination from the "implausibility of the employer's explanation may be problematic" because the employer may have acted for other unsavory reasons. *Id.* at 613. Remanding the case, the Court instructed the First Circuit to determine whether Biggins had produced sufficient indirect evidence of age bias, such as the employer's alleged more favorable

treatment of his replacement and management's alleged discriminatory comments. *Id.*

Together with *Hicks, Hazen Paper* reveals that a discrimination plaintiff must produce some indirect evidence of discrimination separate and apart from (i) the skeletal "replacement" allegation to support a prima facie case; and (ii) evidence tending to refute the plausibility of the employer's explanation for its adverse employment action. Therefore, a complete reading of *Hicks* and *Hazen Paper* buttresses the Fifth Circuit's conclusion that Reeves must present sufficient evidence which, taken as a whole, raises triable issues of both pretext and intentional discrimination. *See, e.g., Walton v. Bisco Indus., Inc.,* 119 F.3d 368, 370 & n.2 (5th Cir. 1997) (holding that to survive summary judgment, plaintiff must raise fact issue on falsity and that discrimination was the real reason); *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.,* 181 F.3d 15, 22 n.5 (1st Cir. 1999) (same); *Vaughan v. MetraHealth Cos., Inc.*, 145 F.3d 197, 199 (4th Cir. 1998) (same).

Contrary to Reeves and his Amici's arguments, his minimal prima facie case evidence — a younger individual replaced him — does not constitute sufficient evidence to support a discrimination finding. In the age discrimination-wrongful discharge context, the prima facie case is *very minimal* and serves the limited purpose of forcing the employer to proffer its explanation; once the employer explains, all presumptions drop and the case proceeds like any other. Under the circumstances presented here, the "combined" evidence (replacement plus pretext) is insufficient and cannot sustain the jury's age discrimination finding. *Hicks*, 509 U.S. 514-15 (concluding that court cannot substitute pretext-only finding for required discrimination finding); *Fisher v. Vassar College*, 114 F.3d 1332, 1340-42 (2d Cir. 1997) (en banc) (reasoning that presumption bolstering prima facie case is transitory and loses its capacity to support inference of discrimination after employer articulates explanation); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994), *cert. denied*, 513 U.S.

1058 (1994) (holding that replacement alone is not enough to support a discrimination finding); *see also EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1186-87 (5th Cir. 1996) (holding that "[e]vidence that does not imply pretext taken alone does not do so when cumulated."). As the Second Circuit appropriately recognized in *Fisher*, evidence sufficient to satisfy the scaled-down prima facie case does not tell much about whether discrimination played a role in the employment decision. *Fisher*, 114 F.3d at 1337. Thus, Reeves' evidence that a younger person replaced him does not raise any inference that Sanderson fabricated the performance-based reasons for his discharge as a cover for age discrimination.

In summary, allowing a plaintiff to proceed to trial without raising a genuine issue of material fact regarding the ultimate question of discrimination would, in effect, treat discrimination cases differently from other cases involving ultimate questions of fact. This rationale would permit disproof of an employer's reason, when linked with a minimal prima facie allegation about a younger replacement, to suffice as an independent means of proving discriminatory intent in an ADEA case — precisely what the *Hicks* Court rejected. Contrary to Reeves and his Amici's rhetorical argument, the Fifth Circuit's pretext for discrimination analysis is consistent with *Hicks* and does not require "direct evidence" of discriminatory treatment.[6]

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6. The Fifth Circuit and other circuits repeatedly have recognized that a discrimination plaintiff can establish a triable discrimination case with circumstantial evidence. *See, e.g., Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993) (applying *McDonnell Douglas* proof scheme when no direct evidence of age discrimination exists); *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 656 (11th Cir. 1998) (applying *McDonnell Douglas* proof scheme to circumstantial evidence case).

II. THE FIFTH CIRCUIT'S PRETEXT FOR DISCRIMINATION ANALYSIS IS CONSISTENT WITH THE ADEA, THE BUSINESS JUDGMENT RULE, AND THE PROOF BURDENS IN DISCRIMINATION CASES

Several compelling reasons demonstrate that the Fifth Circuit's pretext for discrimination analysis properly interprets and applies *Hicks* in the Federal Rule 50 setting.

A. The Fifth Circuit's Analysis is Consistent with the ADEA and the Business Judgment Rule.

The ADEA makes it unlawful for an employer "to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a). Under the pretext test advocated by Reeves and his Amici, a discrimination plaintiff is entitled to a jury trial when he produces the combined evidence to (a) support a prima facie case (a younger replacement) and (b) discredit the employer's stated reasons for the discharge. This test conflicts with the ADEA's express statutory language — it not only allows courts and juries to speculate about the real reason for the discharge, but also, it allows them to infer intentional discrimination from the minimal prima facie criteria and the falsity of the employer's stated reasons.

The ADEA, however, does not protect, and Congress did not intend to protect, plaintiffs under a "just cause" theory. As several courts have explained, the pretext-only interpretation would improperly convert the ADEA into a law ensuring dismissals only for "just cause" to all people over 40, rather than one properly preventing discrimination because of age. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988); *White v. Vathally*, 732 F.2d 1037, 1043 (lst Cir. 1984), *cert. denied*, 469 U.S. 933 (1984). In effect, Reeves' pretext-only analysis would afford special treatment to persons over 40 — a form of affirmative action not contemplated under the ADEA.

Recognizing the distinction between "mistaken" and "fabricated" employer decisions, this Court and the federal

courts of appeal consistently have applied the "business judgment rule" in discrimination cases, namely, the ADEA and other civil rights statutes are not vehicles for judicial second guessing of employer business decisions that might be mistaken, unreasonable, or unfair, but are nondiscriminatory. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (concluding that Title VII does not purport to limit the other [nondiscriminatory] qualities and characteristics that employers may take into account in making employment decisions); *Deines v. Texas Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir. 1999) (determining that "[w]hether the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide."); *Brown v. McDonnell Douglas Corp.*, 113 F.3d 139, 141-42 (8th Cir. 1997) (noting that courts cannot " 'weigh the wisdom of any particular employment decision' " or sit as " 'super-personnel departments' " that review the wisdom or fairness of employers' business judgments, except to the extent that the judgments involve intentional discrimination).[7]

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7. *See also Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997) (noting that courts "may not second-guess an employer's personnel decisions, and we emphasize that employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully."); *Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir. 1993) (explaining that "Title VII is not violated by the exercise of erroneous or even illogical business judgment."); *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988) (holding that "courts are not free to second-guess an employer's business judgment"); *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 560 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987) (holding that "[a] district judge does not sit in a court of industrial relations. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and § 1981 do not interfere."); *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (noting that the ADEA "was not intended as a vehicle for judicial review of business decisions.").

Therefore, in the pretext phase of the burden-allocation scheme, a discrimination plaintiff must produce competent evidence that the employer fabricated its articulated reason to mask discrimination, not merely mistaken or unreasonable decisions. This distinction between a "fabricated" and a "mistaken" decision comports with the well-established business judgment rule — it keeps the judiciary out of the human resources business and ensures that, consistent with *Hicks*, a discrimination plaintiff produces sufficient evidence of an employer's intent to cover *discrimination*.

Moore v. Eli Lilly & Co., 990 F.2d 812 (5th Cir. 1993), exemplifies the proper application of the pretext for discrimination analysis, which allows a court to exercise its proper gatekeeper role by awarding judgment as a matter of law when a plaintiff claims "pretext" based on a potentially mistaken business judgment. Moore, a 30-year Lilly employee, had always been a satisfactory salesman, but Lilly terminated his employment for "falsifying sample records." *Id.* at 814. Complying with the Prescription Drug Marketing Act of 1987, Lilly had a system to track drug samples distributed to physicians by salespersons. Through Lilly's system, all salespersons were required to send "call cards" to Lilly each day, reporting the day's distribution of samples to doctors. The salesperson's daily reports were checked against an inventory of his samples conducted at the end of each quarter. *Id.* If the inventory's results revealed a discrepancy with totals from the salesperson's call cards, then he was considered to be "out of balance," and the disparity would have to be reconciled. *Id.*

When Moore was out of balance in the second quarter of 1990, he sent a letter to the accountability department, attempting to correct the discrepancy. *Id.* Moore apparently never possessed a sufficient supply of samples to make possible the distributions that his letter asserted he had made. Lilly informed Moore that the distribution set forth in his letter was not possible, given the stock he had possessed during the relevant time. *Id.* Moore requested that a Lilly manager return

his letter, but she refused to do so. Lilly then terminated Moore's employment, believing that this incident constituted a falsification of company records. *Id.*

Moore maintained that he had raised a triable fact issue on his pretext burden, claiming that he had not falsified the relevant records and had established a prima facie case. *Id.* at 815-16. Assuming that Moore had established a prima facie case of age discrimination, the Fifth Circuit rejected Moore's argument and explained: "[t]he fact that the employer's reasonable belief eventually proves to have been incorrect — if, for example, Moore were eventually to be vindicated from the charges of falsifying records — would not change the conclusion that the firing had been nondiscriminatory." *Id.* at 816. Additionally, the appeals court reasoned that a discharge may well be "unfair or even unlawful," yet not be evidence of age bias under the ADEA. *Id.* at 819. In the circuit court's words, to maintain a triable ADEA claim, "the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's age." *Id.* Because Moore failed to do so, the Fifth Circuit affirmed summary judgment for Lilly. *Id.*

In their futile effort to sustain the jury's age discrimination finding, Reeves and his Amici, like *Moore* before them, rely largely on Reeves' disagreements with Sanderson's performance-based reasons for his discharge. (Pet. Br. 10; EEOC Br. 25-26). They advocate a pretext-only test that effectively eviscerates the well-established business judgment rule, and would allow a court or jury to infer intentional discrimination from a mistaken or unreasonable employer decision. (Pet. Br. 18-32; EEOC Br. 8-30). The practical result: a discrimination case would go to the jury whenever a plaintiff simply challenged or disagreed with the employer's business decision. This proposition would be true in the context of an employer's workforce reduction predicated on economic reasons, or a supervisor's honest assessment of an employee's inadequate work performance. In turn, courts and juries could second guess

or speculate about the employer's business judgment, placing them in the improper role of a "super personnel department." *See Anderson v. Stauffer Chem. Co.*, 965 F.2d 397, 403 (7th Cir. 1992) (recognizing that neither juries nor courts have the power to act as a "'super-personnel department'" and decide whether the employer's decision was unwise or unjustified).

Because the ADEA is not a "just cause" statute, the pretext-only test Reeves advocates is misguided — Congress did not intend to give courts or juries unchecked veto power over employer business decisions that they deem mistaken, unfair or unreasonable. Discrimination does not lurk behind every inaccurate or incorrect employer statement; individual decisionmakers may "intentionally dissemble" to mask a nondiscriminatory, but humiliating, unbecoming, or irrational reason, such as institutional politics, greed, envy, nepotism, or personal hostility. *Fisher*, 114 F.3d at 1337. The ADEA, however, does not cover these employer motives.

Moreover, Reeves repeatedly characterizes Sanderson's performance-based reasons for his discharge as "lies," but blurs the distinction between *incorrect* business judgments and *fabricated* reasons for an adverse employment action. (Pet. Br. 21). Contrary to his flip and unsupported assertions, Reeves did not produce any evidence that Sanderson contrived the underlying 1995 audit leading to the company's conclusion that Reeves, Caldwell, and Oswalt had failed to track properly employee absences and late arrivals within their respective lines of authority. Reeves *disagreed* with Sanderson's conclusions regarding his work performance, speculated about his own subjective assessment of his performance, and denied that he failed to perform adequately, but his disagreements and self-assessments do not convert Sanderson's audit, investigation, and the ultimate decision to terminate Reeves into contrived reasons for his discharge. *See, e.g., Beall v. Abbott Labs*, 130 F.3d 614, 619-20 (4th Cir. 1997) (holding that " '[i]t is the perception of the decisionmaker which is relevant; not the self-assessment of the plaintiff.' "); *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747

(10th Cir. 1991) (finding that an employee's disagreement with his employer's assessment of his job performance constitutes insufficient grounds for a jury to infer age discrimination). In the end, Reeves, like *Moore*, failed to produce discrete facts showing a nexus between Reeves' age and Sanderson's audit, investigation, and eventual decision to discharge Reeves.[8]

Accordingly, the Fifth Circuit's pretext for discrimination analysis is faithful to the ADEA's language, is consistent with *Hicks*, and avoids the erosion of an employer's business judgment — it requires the discrimination plaintiff to produce sufficient evidence to raise a fact issue on two points: (i) whether the employer's stated reasons were false; *and* (ii) whether age discrimination played a determining role in the employer's decision. *Hicks,* 509 U.S. at 515; *Lawrence,* 163 F.3d at 312; *Rodriguez-Cuervos*, 181 F.3d at 22 n.5. Because Reeves failed to satisfy his burden, this Court should affirm the Fifth Circuit's well-reasoned analysis.[9] ***Reeves v. Sanderson Plumbing Products, Inc.,*** 197 F.3d 688, 691-93 (5th Cir. 1999).

B. The Fifth Circuit's Analysis is Consistent with the Proof Allocation Scheme in a Discrimination Case.

The *McDonnell Douglas-Hicks* proof scheme is well established: when an employer articulates a legitimate, nondiscriminatory reason for its adverse employment action, then any presumption raised by the prima facie case *disappears* and the plaintiff must satisfy his ultimate burden of proving

8. Regarding Reeves' reference to two alleged age-related "stray" remarks, TABCC demonstrates in part III C., *infra*, that those alleged remarks cannot sustain an age discrimination finding.

9. As several courts have recognized, the plaintiff may rely solely on his "pretext" evidence to satisfy both the "falsity" *and* "discrimination" requirements, or he may identify other evidence in the record that points to a discrimination finding. *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 994 (5th Cir. 1996) (en banc); *Fisher,* 114 F.3d at 1338-39. If the plaintiff chooses to rely solely on "pretext" evidence, however, then that same evidence must be *sufficient* to support a *discrimination finding*.

intentional discrimination. *Hicks*, 509 U.S. at 507-08. In *Hicks*, this Court did not use the labels "pretext-plus" or "pretext-only," but required a discrimination plaintiff to demonstrate, as part of his ultimate burden of proof, that the employer's stated reasons for its adverse employment action were both false and that the real reason was discrimination — a *pretext for discrimination* analysis. The *Hicks* Court anchored its pretext for discrimination analysis in the plaintiff's ultimate burden to prove discrimination. *Id.* at 508, 511, 518. This burden remains *at all times* with the plaintiff and *never* shifts to the defendant. *Id.* at 507. Therefore, the Fifth Circuit's analysis is consistent with a plaintiff's ultimate burden of proof in a discrimination case.

In contrast, the pretext-only test advocated by Reeves and his Amici is fundamentally flawed. This approach ignores the Court's statement that a pretext-only or falsity finding is a much different and lesser finding than a discrimination finding. *Id.* at 514-15. In effect, Reeves' pretext test would improperly shift the burden of persuasion back to the employer to establish conclusively that it relied solely on nondiscriminatory reasons in making its employment decisions. *Fisher*, 114 F.3d at 1339 (permitting a plaintiff to win a judgment based on a pretext finding would impermissibly shift the burden of proof to the defendant to disprove discrimination or offer evidence of a "third" reason). Accordingly, under the pretext-only approach, a plaintiff can obtain a jury trial simply by disputing the employer's stated reasons, and relying on a minimal prima facie case allegation that a younger person replaced the plaintiff. The employer is placed in the untenable position of conclusively demonstrating that discrimination played no part in its decision. *See id.* This misplaced interpretation of "pretext" conflicts with the *McDonnell Douglas-Hicks* axiom that plaintiffs, like Reeves, *at all times* bear the burden of proving intentional discrimination. The Fifth Circuit, therefore, correctly applied its two-step pretext for discrimination analysis in concluding that Reeves failed to

present sufficient evidence of age discrimination.[10] *See Reeves*, 197 F.3d at 692-93.

C. Reeves and His Amici Advocate a Pretext Test that is Based on a False Assumption.

To support their pretext argument, Reeves and Amicus EEOC also rely on a so-called "presumption" that once the discrimination plaintiff presents evidence challenging the credibility of the employer's stated reasons for its adverse employment action, a jury is entitled to infer discrimination. (Pet. Br. 18-32; EEOC Br. 8-30). This "presumption" is premised on what one commentator has termed an "ideological litmus test." *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2254 (1995). The "presumption" stems from the idea that the factfinder who disbelieves the employer's stated justification for its employment decision has a basis to infer that the real reason for the decision is discrimination. Relying on language in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), some courts assume it is "more likely than not" that the employer who lies is simply trying to mask the impermissible discrimination alleged by the plaintiff.

The fallacies underlying the "presumption" are twofold. First, it is by no means certain that any particular adverse act against members of a protected group stems from discrimination. When an employer articulates nondiscriminatory reasons for its employment actions, and the plaintiff challenges those reasons, as Reeves purports to do here, the legal system should not create a presumption that his challenge to, or attempt

10. Reeves also refers to *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989), to support his pretext-only position, stating that "[i]n holding proof of pretext is not sufficient to prove intentional discrimination, the Fifth Circuit disregards *Patterson*." (Pet. Br. 26). Reeves is mistaken. *Patterson* is a pre-*Hicks* case that did not purport to adopt any particular "pretext" analysis. The *Patterson* pages Reeves cites, 187-88, only reveal this Court's conclusion that plaintiffs are not limited in the types of evidence they may use to demonstrate the falsity of an employer's reasons.

to cast doubt on, the employer's stated reasons leads to the inexorable conclusion that the employer's actions were motivated by discrimination. To do so creates a form of judicially created "affirmative action" in favor of members of the protected class (all employees over 40 years of age), allowing them to recover for some hypothetical "discrimination" based on what the employer's motive *might have been* under the circumstances. Instead, as this Court emphasized in *Hicks*, the discrimination plaintiff is required to produce individualized proof that the employer's stated reasons are a pretext for discrimination. *Hicks*, 509 U.S. at 507-08; 514-17.

Second, deriving a presumption of discrimination from the employee's challenge to the credibility of the employer's reason is unwise — it rests on a flimsy ideological or policy premise that when an employer acts arbitrarily, it always does so for discriminatory reasons the employment discrimination statutes prohibit. *See* Malumud, *The Last Minuet* at 2255-58 (criticizing the "policy" premise underlying any presumption of discrimination); *Fisher*, 114 F.3d at 1337 (noting that discrimination does not lurk behind every inaccurate employer statement; employer may try to hide humiliating or unbecoming reasons for discharge). In *Fisher*, the en banc Second Circuit appropriately recognized that any discrimination "presumption" derived solely from a pretext finding ignores real world employment relationships, where business decisions may camouflage irrational or political judgments that are not infected with any discriminatory bias. *See id.* Further, under the business judgment rule, an employer may make incorrect, unreasonable or even wrong employment decisions, but unless age-related animus fuels those decisions, the employment discrimination statutes, including the ADEA, do not prohibit these decisions. Accordingly, the Fifth Circuit's pretext for discrimination analysis, which correctly applies *Hicks* in a Federal Rule 50 setting, avoids the fallacies underlying the "discrimination presumption" and properly requires a discrimination plaintiff, like Reeves, to present individualized proof or, in the words of *Moore*, "discrete facts" that he was treated differently than

similarly situated employees *because of* his age. *Moore*, 990 F.2d at 819.

Finally, Reeves asserts that a jury is entitled to draw an adverse inference against the employer when it lies about the reasons for its employment actions. Again, this argument ignores *Hicks*. Justice Scalia, writing for the majority, explained that just because an employee counters an employer's stated reasons for its employment actions does not mean that the employer has "lied" about the reasons for its employment decision. *Hicks*, 509 U.S. at 520-21 (explaining that "[t]o say that the company which in good faith introduces testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd."). This proposition is especially true here. Reeves may have disagreed with Sanderson's conclusions stemming from the audit, and he may have disagreed with Sanderson's assessment of his work performance, but those rebuttals and disagreements do not, by any stretch of the imagination, constitute "lies." *Id*. In any event, even if they did, they would not support a discrimination finding. *See id*. at 521 (concluding that "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that.").

III. REEVES FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT AN AGE DISCRIMINATION FINDING UNDER THE ADEA.

Applying its well-established "sufficiency of the evidence" standard for awarding judgment as a matter of law, the Fifth Circuit properly concluded that Reeves failed to produce sufficient evidence to sustain an age discrimination finding.[11]

11. This Brief primarily addresses the Fifth Circuit's proper application of its two-step pretext for discrimination analysis. Reeves, however, also maintains that the Fifth Circuit erred in (i) considering *all* of the evidence, instead of only the evidence favoring him; and (ii) reviewing Sanderson's Rule 50 motion for judgment as a matter of law in the same manner as a Rule 56 motion for summary judgment. (Pet. Br. 33-49). As the EEOC's amicus brief supporting Reeves concedes, these arguments are without merit. (EEOC Br. 23 n. 6).

(Cont'd)

Reeves relies on four evidentiary assertions to support his argument that he presented enough evidence to sustain the jury's discrimination finding: (i) younger individuals replaced him after Sanderson let him go; (ii) he rebutted the inaccurate recordkeeping reason for his discharge; (iii) Sanderson focused on mistakes related to one of his subordinate employees when the company discharged him, but the company focused broadly on numerous recordkeeping mistakes for twelve employees at trial; and (iv) a manager with "absolute power" supposedly made two stray, age-related remarks and that manager was one of three individuals who recommended his discharge. (Pet. Br. 4-15). Singularly or together, this so-called "evidence" is insufficient to sustain an age discrimination finding.

A. Reeves' Minimal Prima Facie Case, Coupled with His Alleged Evidence of Falsity, Does Not Constitute Sufficient Evidence of Age Discrimination.

Reeves and Amici EEOC rely heavily on Reeves' prima facie case, namely, that younger individuals replaced Reeves after Sanderson let him go. (Pet. Br. 21-22; EEOC Br. 21-25). That reliance is misplaced. In the context of an ADEA discharge claim, the prima facie case is a minimal one; it is essentially a procedural device to force the employer to explain its reasons for an adverse employment action. *See, e.g, Fisher*, 114 F.3d at 1340-42 (explaining that prima facie case serves limited purpose of "forcing out employer's explanation"); *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 316 (2d Cir. 1999) (ADEA prima facie case is a *de minimis* burden); *Nichols v.*

(Cont'd)

Consistent with the Fifth Circuit's analysis, courts review *all* of the evidence — "the record taken as a whole" — when considering Rule 56 summary judgment motions (they merely draw inferences in the non-movant's favor), and the standard for granting Rule 56 summary judgment motions "mirrors" the standard for granting Rule 50 motions for judgment as a matter of law. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Loral Vought Sys. Corp., 81 F.3d 38, 41 (5th Cir. 1996) (plaintiffs " 'need only make a very minimal showing' " to establish an ADEA prima facie case); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (proof necessary to establish ADEA prima facie case on summary judgment "is minimal and does not even need to rise to the level of a preponderance of the evidence.").

Here, when Sanderson articulated its nondiscriminatory reasons for discharging Reeves, his minimal prima facie case disappeared and he was put to the ultimate test to produce sufficient evidence of age discrimination. *Hicks*, 509 U.S. at 510-11.[12] At the pretext for discrimination stage, Reeves cannot resurrect the "replacement" evidence as an "inference" of age discrimination; the "replacement" fact does not tend to show that Sanderson contrived its articulated reasons as a cover for age discrimination. *Fisher*, 114 F.3d at 1342-44. Moreover, younger employees naturally tend to replace older employees and, as several courts have concluded, the mere fact of replacement by a younger employee does not support an inference that the employer intentionally discriminated against an employee on account of his age. *See Chappell v. GTE Products Corp.*, 803 F.2d 261, 267 (6th Cir. 1986) (concluding that "[t]he isolated fact that a younger person eventually replaces an older employee is not enough to permit a rebuttal inference that the replacement was motivated by age discrimination.").

B. Reeves' Evidence Contesting His Unsatisfactory Work Performance Does Not Support an Age Discrimination Finding.

Reeves characterizes Sanderson's reasons for his discharge as "lies," contending that he did not fail to keep accurate absenteeism/tardy records, and that his supervisor, Caldwell, was ultimately responsible for any recordkeeping failures. (Pet. Br. 10-13, 21). In turn, Reeves maintains that Sanderson offered "shifting" reasons for his discharge, telling him one thing

12. *Cf.* Malamud, *The Last Minuet* at 2244-45, 2317-23 (1995) (opining that prima facie case has little evidentiary value).

when the company discharged him, and articulating a different reason at trial. (Pet. Br. 10). Cutting through Reeves' rhetoric about "lies," his purported evidence is reduced to two things: (i) he challenged the records revealing his errors in tracking subordinate employees' absences/late arrivals; and (ii) he disagreed with Sanderson's audit and resulting assessment that any admitted errors warranted his discharge because Caldwell, not he, ultimately was responsible for any timekeeping errors. (Pet. Br. 10-15).

Reeves misses the point. While he may have disputed the evidence underlying the alleged recordkeeping errors, that dispute cannot sustain an age discrimination finding. It is well established that a discrimination plaintiff cannot raise a material fact issue regarding pretext by simply refuting the employer's legitimate, nondiscriminatory reason. *Hicks*, 509 U.S. at 511 n.4, 515; *Roxas v. Presentation College*, 90 F.3d 310, 316 (8th Cir. 1996). Likewise, Reeves' disagreement with Sanderson's assessment of his work performance, especially as it related to his duty to review the accuracy of the daily, weekly, and monthly time reports, cannot sustain a discrimination finding. *See Fallis*, 944 F.2d at 747 (concluding that an employee's disagreement with his employer's assessment of his job performance does not allow a jury to infer age discrimination).[13]

Rather, Reeves was required to produce evidence that Sanderson fabricated its stated reasons as a pretext for age

13. *See also Beall v. Abbott Labs.*, 130 F.3d 614, 619-20 (4th Cir. 1997) (holding that, in disagreements about performance, " '[i]t is the perception of the decisionmaker which is relevant,' not the self-assessment of the plaintiff."); *Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1262-63 (7th Cir. 1993), *cert. denied*, 511 U.S. 1005 (1994) (courts may not sit as super-personnel departments that review employers' decisions — the employer is in a better position than a court to assess its employees' relative qualifications and performance); *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1403-04 (10th Cir. 1988) (age discrimination verdict cannot stand on the employee's disagreement over his qualifications alone).

discrimination. He failed to do so. Reeves, for example, never challenged the 1993 warning memorandum or the underlying 1995 audit as Sanderson's fabricated efforts to discharge him because he was "too old." Instead, Reeves focused on the accuracy of the records, explained that he was not at fault, or tried to shift the blame to his immediate supervisor. But none of these explanations tend to show that Sanderson fabricated the underlying 1995 audit leading to the discharge of Reeves and the younger Caldwell, and the audit's nondiscriminatory conclusion that Reeves, Caldwell, and the 33 year old Oswalt were responsible for the recordkeeping errors.[14]

Further, the Fifth Circuit correctly concluded that Sanderson's so-called "shifting" reasons for discharging Reeves did not constitute sufficient evidence of age discrimination. Sanderson consistently maintained, from the time it discharged Reeves to the time of trial, that the company decided to let Reeves go because of unsatisfactory job performance related to recordkeeping errors. Even if the company had focused on one particular employee during Reeves' exit interview, and later focused on numerous employee examples at trial, that broader focus does not sustain any finding of age discrimination. Sanderson's articulated reasons for the discharge did not "shift" or change; the company simply buttressed its original explanation with additional evidence at trial. That is a far cry from any contrived reason for the discharge.

Accordingly, Reeves' attempt to use the younger "replacement" fact, in combination with his rebuttal of Sanderson's stated reasons, is unavailing. His combined "evidence" is insufficient to support a reasonable finding of age discrimination.

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14. The record also demonstrates that Sanderson would have discharged Oswalt for the same reasons as it discharged Reeves, had Oswalt not resigned from Sanderson in August 1995. (Res. Br. 2).

C. The Two Alleged Stray Remarks Do Not Support an Age Discrimination Finding.

Finally, Reeves and his Amici rely on two alleged stray remarks to support the jury's age discrimination finding. (Pet. Br. 4; EEOC Br. 6). As this Court and the federal circuit courts have concluded, alleged discriminatory remarks do not constitute evidence of a discriminatory motive when the remarks are "stray" ones, namely, vague, remote in time, or made by a non-decisionmaker. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513-14 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991); *Williams v. Williams Elecs., Inc.*, 856 F.2d 920, 925 (7th Cir. 1988).

Reeves contends that Powe Chesnut, the Director of Quality Control, made two age-related remarks approximately two months before Reeves' dismissal: "[y]ou are so old you must have come over on the Mayflower" and, when Reeves experienced trouble with a machine, Chesnut supposedly said, "[y]ou are too damn old to do your job." Applying the well-established "stray" remarks test, one that is consistent with this Court's *Price Waterhouse* decision, the Fifth Circuit concluded that Chesnut's alleged remarks did not constitute sufficient evidence of age discrimination. This analysis is correct. Based on the uncontested facts adduced at trial, Ms. Sanderson *alone*, not Chesnut, made the ultimate decision to discharge Reeves.[15]

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15. Reeves cites *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985), for the proposition that "the motives of *all* decisionmakers need not be proved to establish a discrimination case." This argument is misguided. Chesnut was not a decisionmaker and, therefore, *Anderson* is inapposite. (Pet. Br. 30). Further, even if Chesnut had been the decisionmaker or if, as Reeves suggests in footnote 21 of his brief, Chesnut only had to be involved in the decisional process, Reeves still failed to produce sufficient evidence to support a discrimination finding — he failed to demonstrate that Chesnut's alleged remarks were related to the decisional process. *See, e.g., Shorette v. Rite Aid*, 155 F.3d 8, 13

(Cont'd)

Additionally, Chesnut was only one of three persons who recommended that Ms. Sanderson discharge Reeves based on the audit results. Even if Chesnut had harbored some age-related animus against Reeves, the undisputed testimony reveals that Chestnut's alleged remarks made some two months before the discharge decision, could not have been a determining factor in Sanderson's decision to discharge Reeves — a decision that led to the discharge of both Reeves and the *younger* Caldwell. Reeves did not produce any evidence of a nexus between the alleged remarks and Ms. Sanderson's decision two months later.

CONCLUSION

In light of the principles espoused in *Hicks*, the Fifth Circuit properly applied a pretext for discrimination analysis to determine that Reeves failed to present sufficient evidence to support an age discrimination finding. Reeves' skeletal prima facie case (his replacement by a younger person), coupled with his supposed evidence contesting his inadequate work performance, should not sustain a discrimination finding under the ADEA. The Fifth Circuit's pretext for discrimination analysis is faithful to the ADEA's language prohibiting *age* discrimination, is consistent with the business judgment rule, and comports with the plaintiff's ultimate burden to prove intentional age discrimination. The Fifth Circuit appropriately exercised its gatekeeper role to reject the jury's finding when, based on *all* the evidence, it was not anchored in sufficient evidence of discrimination. Contrary to Reeves and his Amici's accusations, the appeals court did not invade the province of the jury, but simply determined that judgment as a matter of law was warranted in view of Reeves' failure to produce sufficient evidence that Sanderson's stated reasons were fabricated and that age discrimination was the real reason.

(Cont'd)
(1st Cir. 1998) (recognizing that decisionmakers' statements that are unrelated to the decisional process are normally insufficient to prove the employer's discriminatory animus).

Therefore, this Court should affirm the Fifth Circuit's judgment in favor of Sanderson.

Respectfully submitted,

DEAN J. SCHANER
Counsel of Record
SCOTT M. NELSON
HAYNES AND BOONE, L.L.P.
Attorneys for Amicus Curiae
Texas Association of Business
and Chambers of Commerce
1000 Louisiana, Suite 4300
Houston, Texas 77002
(713) 547-2000